FILED

No. __-____ 981487 MAR 15 1999

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

MICHAEL D. DIEDERICH, JR.,

Petitioner,

—v.—

THE COUNTY OF ROCKLAND, C. SCOTT VANDERHOEF, COUNTY EXECUTIVE and PAUL NOWICKI, COUNTY ATTORNEY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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4/3??

QUESTIONS PRESENTED

As to a municipal civil servant, a staff attorney who, along with three other Democratic part-time attorneys, was terminated from his public employment shortly after a Republican county executive took office, where none of many full-time Democratic attorneys were fired, and where the municipality acknowledged that political affiliation was irrelevant to job performance:

1. Are principles of federalism violated when a federal court ignores a state's merit-based civil service system by denying First Amendment protection to a civil servant?

2. Should the federal courts nationwide be permitted to create a categorical rule that attorneys are not entitled to First Amendment protection in their public employment, even when political affiliation is admittedly irrelevant to effective job performance?

3. Can the federal courts countenance a municipality's intentional deception of its citizens regarding the operation of government—"informational gerrymandering"—without violating the Guarantee Clause's promise of a republican form of government?

4. May a federal court dismiss a *prima facie* §1983 case of First Amendment retribution, including the taking of vested time accruals, without any inquiry into the facts at hand?

PARTIES TO THE PROCEEDING

The names of all parties to the proceedings in the court whose judgment is sought to be reviewed appear in the caption of the case, except that the county attorney is now Patricia Zugibe.

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Petitioner, Michael D. Diederich, Jr., respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINION BELOW

The Court of Appeals' opinion is not published, but can be found at *Diederich v. County of Rockland*, 1998 U.S. App. LEXIS 31460 (2d Cir. 1998), annexed at Appendix A. The district court's opinion is reported at *Diederich v. County of Rockland*, 999 F. Supp. 568 (S.D.N.Y. 1998), annexed at Appendix B). The district court's civil judgment is at Appendix C.

STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment on December 15, 1998. Pursuant to Supreme Court Rule 13.1, this petition is filed within 90 days of the date of entry. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution reads, in part, as follows:

> "Congress shall make no law ... abridging the freedom of speech, ... and to petition the Government for a redress of grievances."

Article IV, section 4 of the United States Constitution reads, in part, as follows:

> "The United States shall guarantee to every State in this Union a Republican Form of Government ...."

Article 5, section 6 of the New York State Constitution provides:

> "Appointments and promotions in the civil service of the state and all of the civil divisions thereof, including cities and villages, shall be made according to merit and fitness to be ascertained, as far as practicable, by examination which, as far as practicable, shall be competitive;...."

Section 42 of the New York State civil service law provides, in part:

> "1. The non-competitive class shall include all positions that are not in the exempt class or the labor class and for which it is found by the commission having jurisdiction to be not practicable to ascertain the merit and fitness of applicants by competitive examination. Appointments to positions in the non-competitive class shall be made after such non-competitive examination ...."

Section 107 of the New York State civil service law, the "Little Hatch Act," provides, in part:

> "1. ... No recommendation or question under the authority of this chapter [the N.Y.S. civil service law] shall relate to the political opinions or affiliation of any person whatever; and no appointment or selection to or removal from an office or employment within the scope of this chapter or the rules established thereunder, shall be in any manner and affected or influenced by such opinions or affiliation.
>
> 2. ... No person shall directly or indirectly ask, indicate or transmit orally or in writing the political affiliation of any employee in the civil service of the state or of any civil division thereof ..., as a test of fitness for holding office."

STATEMENT OF THE CASE

This First Amendment case can resolve a profound dilemma faced by thousands, if not tens of thousands, of governmental attorneys throughout the country, namely, whether their loyalty should be to merit service and professionalism (especially when in a merit-based civil service system), whether it should be to political bosses and partisan interests. How the First Amendment question is resolved will determine whether America's participatory democracy will include educated public servants, or exclude them.

This case raises questions of nationwide importance. The Second Circuit's "shared ideology" doctrine is being used to justify patronage the blanket discharge of attorneys and other public employees, which *per se* approach is employed in other circuits. The

"shared ideology" doctrine abridges not only public employees' right of political association, but also of free speech. And if employees cannot speak or affiliate, they cannot participate in democracy. This Court's intervention is needed, not only for the sake of individual liberty, but for our democracy.

1. *Patronage Discharge of Public Attorneys*

The material facts in this case are undisputed. Petitioner's employment, and that of other Democratic attorneys, was terminated after the election of a Republican county executive in 1993. Petitioner's colleagues promptly filed suit, resulting in a jury verdict in their favor, which jury specifically found that political affiliation was unnecessary for effective job performance and thus did not justify the patronage discharges. The verdict was reversed by the Second Circuit Court of Appeals in *Gordon v. Rockland County*, 110 F.3d 886 (2d Cir., 1997*), cert. denied*, 118 S. Ct. 74 , 139 L. Ed. 2d 34 (1997).

Petitioner's amended complaint was filed after, and in response to, the *Gordon* decision. Respondents then moved under Rule 12(b)(6) to dismiss the amended complaint, which motion was granted. *App.* 3a. Dismissal was affirmed by the Court of Appeals below. *App.* 1a.

2. *Petitioner, a Protected Civil Servant whose Discharge Was Unrelated to Effective Job Performance*

The decisions below were made notwithstanding unrefuted allegations supporting petitioner's First Amendment claims. Petitioner received a civil service appointment, as a part-time attorney for respondents' department of solid waste management and law department, after (non-competitive) civil service examination.[1] His job description was identical to his more senior co-workers: full-time assistant county attorneys, also Democrats, but whom remained employed.

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[1] Petitioner's civil service appointment was based upon merit under § 42 of the New York State civil service law, and was thus distinct from appointment to the civil service law § 41 "exempt" category (which included positions such as the county attorney, deputy county attorney and confidential secretary). Petitioner's full-time colleagues, with identical job description, enjoyed full tenure as § 44 "competitive" employees. *See*, N.Y.S. Civil Service Law §§ 41, 42 & 44.

Respondents offered no evidence that political affiliation was needed for the effective performance of petitioner's staff attorney job. On the contrary, respondents' statements, corroborated by its conduct, are that political affiliation was irrelevant to the attorney job. All evidence in this case reveals this non-partisan role.

a. *Petitioner was Not a Patronage Appointee*

Petitioner's public service career is representative of many attorneys in public service, beginning in 1984 with a three year military tour as a Judge Advocate Corps (JAG) officer serving with the United States Army in Europe. Thereafter, petitioner was hired as an assistant county attorney for Westchester County, where he worked in a Republican Administration, practiced environmental law, earned a Masters of Law degree in environmental law, and represented Westchester County in submitting a petition to this Court.[2] Many municipal law departments protect their attorneys from political discharge, either through civil service (as here) or collective bargaining.

Thus, petitioner's background was not that of a political appointee, but rather was one of a professional governmental attorney especially qualified in environmental law. This is consistent with petitioner's appointment in a merit-based civil service title.

It is unrefuted that petitioner was hired on merit as an environmental attorney for the respondent Rockland County, based upon his professional background and experience. As a part-time attorney, petitioner played an active environmental role for Rockland County, submitting a brief to this Court in the solid waste flow control case, *C &A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994), and authoring a law review article on the subject.[3]

b. *Staff Attorneys in a Merit-Based Municipal Law Department*

The County's expressed view is that its Law Department is professional and non-partisan, which view did not change after the November 1993 election. Both the former county attorney, Ilan

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[2] The Petition for Certiorari was denied in *N.Y.C. Public Utility Services Agency et al v. FERC*, 502 U.S. 810 (1991).

[3] Diederich, *Does Garbage Have Standing?--Democracy, Flow Control and Solid Waste Management*, 11 PACE ENVT'L L. REV. 157 (Fall 1993).

Schoenberger, and his successor, respondent Paul Nowicki, publicly expressed the view that partisanship had no place in the office.

Mr. Nowicki's public stance regarding his termination of petitioner's Democratic colleagues was not based upon political affiliation:

> Question: Can you explain why you wanted new attorneys?
> Answer: Because I wanted to.
> Question: Did you have any specific reasons other than that they were new to the office?
> Answer: Different, yeah. No.
> Question: No reason?
> Answer: That was the reason.
> Question: That they were new and different?
> Answer: Right.
> Question: There was no other criteria applied?
> Answer: No.

See, Gordon v. Rockland County Trial transcript at p. 312-13.

Political affiliation, according to Mr. Nowicki, had no bearing in firing the Democrats. For example, Nowicki was acquainted with petitioner's replacement, yet did not know his political affiliation:

> Question: Is he a Republican?
> Answer: If I have to bet, I bet he was, but I wouldn't bet a lot."

Id., at 315.

This was also the publicly expressed view of the newly elected county executive, respondent C. Scott Vanderhoef, who claimed that his personnel actions were solely based upon merit. As quoted in a local weekly newspaper, respondent Mr. Vanderhoef asserted:

> "If anybody thinks that people 'trade favors' to get jobs in Rockland County, they don't understand how we handle appointments in this administration. Politics doesn't matter in these appointments—the only thing that matters is merit. We want to make sure that the best person is selected to take care of the taxpayers' needs."

See, THE INDEPENDENT, May 21, 1997, at 5 (emphasis added)

c. *The Attorney Position, and Lawyer Professional Ethics, Required Non-Partisanship*

Merit appointment was consistent with the non-partisan duties of respondents' staff attorneys. The county attorney is appointed with the consent of the county's legislature (which remained Democratic). The Legislature is the policy-making body for the county, and an important duty of the new Republican county attorney and his staff is to give counsel and representation to the Democratic Legislature.

The nonpartisan role of respondents' staff attorneys is also shown by the status of each of the full-time assistant county attorneys, all of whom enjoy fully-protected "competitive" civil service status (as determined by the local civil service commission). Full-time and part-time assistant county attorneys have identical job descriptions, with the only difference between them being that the full-time attorneys had more extensive duties and responsibilities and competitive civil service status, and the part-time attorneys had lesser responsibilities and non-competitive civil service status.[4]

After Mr. Vanderhoef's election, the only attorneys who were replaced were the county attorney, and the part-time attorneys. The deputy county attorney (Ms. Zugibe), and the full-time assistant county attorneys, all Democrats, remained employed.[5]

3. *Patronage Appointees Turn into Protected Civil Servants*

After the new patronage-appointed assistant county attorneys were installed, the Respondents began efforts to transform these jobs into the protected service civil service "competitive" class, for their new hirees. At the same time, respondents were arguing to the Second Circuit in *Gordon* that "shared ideology" is necessary for these "assistant county attorney" positions. Respondents have never explained how the same job description requires shared ideology one moment, and then does not after new attorneys are appointed.

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[4] Of course, the county attorney and deputy county attorney had the greatest responsibility, and were both in the civil service § 41 "exempt" category.

[5] As indicated in the Parties to the Proceeding above, Mr. Vanderhoef's new county attorney is Patricia Zugibe, who has remained employed in the Law Department, originally hired as an assistant county attorney under the prior Democratic administration. This appointment of a Democrat by a Republican is consistent with Mr. Vanderhoef's articulated "merit-appointment " philosophy."

4. *Political Retaliation regarding Earned Time Accruals and Other Earnings*

Petitioner's amended complaint alleges a 42 U.S.C. § 1983 violation based upon the county respondents' refusal to pay petitioner approximately $8,000 in earned time accruals solely because of petitioner's political affiliation, which vested entitlements vanished from petitioner's last wage and earnings statement. Petitioner similarly alleges that the respondents delayed payment for other contractual earnings, until immediately after decision in the *Gordon* case, and that this delay was similarly due to petitioner's political affiliation. Without any discovery on this issue, the courts below found no § 1983 violation, but rather characterized the constitutional deprivations as a mere contractual issue.

5. *Respondents' Sanctions Motion against Petitioner for Pursuit of First Amendment Claims*

In response to petitioner pursuing his First Amendment claims in the District Court, respondents moved for Rule 11 sanctions, based upon the *Gordon* decision, notwithstanding that the *Gordon* plaintiffs were then seeking certiorari by this Court, notwithstanding that the *Gordon* court was under the incorrect impression that the plaintiff attorneys were exempt employees, and notwithstanding the civil service status job metamorphosis for the patronage hirees.

6. *Second Circuit Summary Affirmance*

In its summary opinion, the Second Circuit acknowledged petitioner's non-exempt civil service status, but held that this was not determinative and merely one factor to consider. However, with virtually no evidence submitted by respondents on its motion to dismiss, the court of appeals based its decision not on the uncontested evidence and averments of this case, but rather on the *Gordon* case, where petitioner was not a party.

REASONS FOR GRANTING THE WRIT

Certiorari is necessary here for compelling reasons: First, the court of appeals decision below directly conflicts with this Court's public employment patronage discharge and free speech decisions, and with fundamental principles of federalism. The Second Circuit sanctioned the partisan discharge of a civil servant, notwithstanding that:

- state civil service law afforded petitioner First Amendment protection;
- the county declined to assert, or to demonstrate, that political affiliation was needed for effective job performance, but instead always viewed political affiliation as irrelevant to attorney job performance;

The court of appeals uses a "shared ideology" approach to patronage discharge cases, dispensing with this Court's teachings that political discharge requires that political affiliation be necessary for effective job performance. Today, lawyers in public service are categorically denied First Amendment rights as citizens. This new doctrine approach not only abridges public servants' right of association, but also eliminates their right of <u>any</u> speech , or even silence, since any expression or non-expression negates "shared ideology." Court of appeals holdings in this and similar cases reflect a monumental departure from this Court's teachings regarding basic constitutional law which must be corrected.[6] Sup.Ct. Rule 10(c).

The Second Circuit's rulings in particular imperil the livelihoods, and will divide the loyalties, of governmental lawyers and other professionals throughout the nation, by making them vulnerable to partisan politics irrespective of their civil service status, and irrespective of the relevance of political affiliation to their public employment. The rulings will subject public employees to termination for even trivial expression of a "non-shared ideology." Employee duty to professionalism, legal ethics, public service and their local community finds no judicial sanctuary. Career longevity in the public sector will once again be governed by Tammany Hall. Qualified lawyers will decline public service. Others will become

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[6] *See, e.g., Branti v. Finkle*, 445 U.S. 507 (1980); *Elrod v. Burns*, 427 U.S. 347 (1976); *Connick v. Myers*, 461 U.S. 138 (1983); *Pickering v. Board of Education*, 391 U.S. 563 (1968).

political sycophants. Without judicial protection, public attorneys' speech will be frozen, and cronyism will reign supreme.

A second reasons for certiorari is that the court of appeal's holdings are in conflict with those of other circuits, most seriously by holding that governmental attorneys (except public defenders) are *per se* unprotected against political patronage by the First Amendment, and that such claims from governmental staff attorneys cannot reach a jury because of the "inherent" policymaking nature of an attorney's job description. This profoundly conflicts with the Eleventh Circuit, which has stated that assistant United States attorneys are protected against patronage dismissal, (and thus assistant county attorneys as well.) *See*, *Cutcliffe v. Cochran*, 117 F.3d 1353, 1358, n.4 (11th Cir. 1997). The Second Circuit views conflict with the Fifth, Seventh and Eighth Circuit views that a jury of citizens, not unelected judges, are best suited to determine difficult factual and policy questions, such as those presented here. *See*, *Soderbeck v. Burnett County, Wisconsin*, 752 F.2d 285, 288-89 (7th Cir. 1985). . And the Second Circuit's views conflicts with the Eleventh Circuit, which rejects the notion that a "paper" job description reciting "policymaking" duties is dispositive of the First Amendment issue. *See, Parrish v. Nikolits*, 86 F.3d 1088, 1093 (11th Cir. 1996). This Court must resolve these case-determinative conflicts, particularly the right to a jury where local governance is at stake. Sup.Ct. Rule 10(a).

Thirdly, the court below determined that there was no constitutional foul, and no 42 U.S.C. § 1983 claim, where a county government retaliates against a citizen by denying over $8,000 in earned time accruals and by delaying contractual payments due to petitioner's political affiliation. In its supervisory role, the Court should review the summary rejection, without any discovery, of this civil rights claim. Sup.Ct. Rule 10(a).

Fourthly, by ignoring a central feature of state governance, New York's constitutionally-mandated system of meritocracy in public employment, and by allowing local democracy to be impaired through "informational gerrymandering," the lower courts have disregarded the Guarantee Clause's promise of a republican form of government. *See*, Art. IV, § 4. Democracy requires honesty from governmental leaders, not deception of the electorate about the partisan firing of protected civil servants. These are novel and profoundly important issues. Sup.Ct. Rule 10(c).

In sum, this case offers an extraordinary opportunity for the

Court to review this legal terrain, to create desirable bright lines[7] clarifying the constitutional rights of civil servants, and to clarify when patronage dismissal is permissible. This case presents novel questions of federalism, public employees' First Amendment rights, and participatory democracy, all of vital importance to the American public.

POINT I

The Second Circuit disregard for a state's system of self-governance—here New York 's civil service meritocracy—imperils federalism as well

In ruling on petitioner's claims, the Second Circuit totally ignores the very body of law—state civil service law—which provides the foundation for deciding a First Amendment patronage discharge cases. This Court's prior patronage cases all involved civil service exempt employees. *See, e.g., Branti v. Finkel*, 445 U.S. 507 (1980); *Elrod v. Burns*, 427 U.S. 347, 357 (1976).[8] Petitioner was a non-exempt classified civil servant.

The lower courts' summary rejection of the New York's civil service law, which state law is merit-based and prohibits political influence, disregards basic principles of federalism and cannot be left standing.[9] New York State's constitution and civil service law are all absolutely clear. They mandate meritocracy in the civil service, free of political influence. *See, e.g., Ottinger v. State Civil Service Commission*, 240 N.Y. 435, 148 N.E. 627 (1925)(Cardozo, J.) (Attorney General staff not *per se* exempt); New York State Constitution, art. 5, § 6. As a public employee in the civil service law § 42 "non-competitive" class, petitioner had First Amendment rights.

The Second Circuit fails to respect this governing state law. As stated in *Voorhis v. Warwick Valley Central School District*, 92 A.D.2d 571, 572; 459 N.Y.S.2d 325, 327 (2d Dept. 1983):

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[7] *See*, Porto, *The Consititution and Political Patronage*, 13 PACE L. REV. 87 (Winter 1993)

[8] *See also*, Note, *Politics and the Non-Civil Service Public Employee: a Categorical Approach to First Amendment Protection.* 85 COLUM. L. REV. 558 (1985).

[9] The Guarantee Clause is closely related. *See*, Point VI *infra*.

> "...permanent public employees in the noncompetitive class, such as petitioner, are protected from bad-faith discharge in contravention of the fundamental purposes of the civil service system (e.g., discharge for patronage purposes....)" (emphasis added)

This view of New York State's civil service law was recently confirmed by federal district court Chief Judge Charles Brieant:

> "Positions in the competitive class are filled from among the top three names on a list certified by the Commission after conducting a competitive examination. Positions in the non-competitive class may be filled upon showing that the appointee has the qualifications necessary to perform the job. As to exempt positions, anything goes."

See, Largo v. Vacco, 977 F.Supp. 268, 273, n.3 (S.D.N.Y. 1997).[10]

The lower court's generalized view of First Amendment exemptions here is not a minor intrusion, but affects the machinery of government in New York State—its civil servants. For the courts below to ignore New York's constitutional and legislative choice on a matter of self-governance, by overriding its civil service law, strikes a blow to federalism.

The Second Circuit had it correct in an earlier case when it said:

> "Both the interests of federalism and the conservation of judicial resources would ordinarily be better served by the federal courts' giving substantial deference to the state's judgment where government positions are so defined."

See, Savage v. Gorski, 850 F.2d 64, 69 (2d Cir. 1988)(involving civil service law § 41 "exempt" positions). Ignoring the state civil service law "allows the federal judiciary to intrude undesirably into the very structure of the state and local governments. *Id.*

This Court must not allow the Second Circuit to adopt a neo-

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[10] Respondents may cite a 1935 New York case, decided by a 4-3 vote, for the proposition that Civil Service Law § 107 does not protect non-competitive class civil servants. *See, Merriweather v. Roberts*, 268 N.Y. 12 (1935). However, as both Chief Judge Brieant and the *Voorhis* court undoubtedly recognized, *Merriweather* (involving politically motivated discharge of this low-level, non-confidential, non-policymaking employee--an assistant bathhouse keeper) is certainly not good law today, in light of this Court's dictates in *Elrod* and *Branti*.

Lockner[11] approach, ignoring state law protective of employees (e.g., New York's civil service law) so that it can also ignore First Amendment protection.[12] The courts of appeal must be reminded that unbridled patronage is not sanctioned by this Court even as to exempt employees, let alone the protected civil servant involved here.

The court of appeal's antimajoritarian disregard for New York merit system of public employment, and the protection it affords to non-exempt civil servants, is contrary to fundamental principles of federalism. Certiorari is required to preserve the proper federal-state relationship.

POINT II

It is an affront to this Court's teachings in *Branti, Elrod, Connick & Pickering* to permit a political patronage of a staff attorney, where the municipality admits that political affiliation is irrelevant to job performance

The facts of this case indicate that political affiliation had absolutely no bearing on job performance of petitioner or his part-time Democratic colleagues. Respondents have not even pretended that political affiliation was or is necessary for attorney job performance. Yet, the Second Circuit's view is that public attorneys are *per se* exempt from First Amendment protection against patronage discharge (and thus exempt from free speech protection as well) because of a purported governmental privilege of hiring or retaining attorneys based upon "shared ideology." This is a dangerous judicial approach, which abridges participatory democracy.

A. *Political Affiliation was Indisputably Irrelevant to Attorney Job Performance*

In this case, the court of appeals has authorized politically partisan "open season" on unaffiliated or politically mis-affiliated

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[11] *Lochner v. New York*, 198 U.S. 45 (1905).

[12] *See*, GERALD GUNTHER, LEARNED HAND: THE MAN AND THE JUDGE (1995), at p.118-123 (Judge Learned Hand's own life experience regarding Tammany Hall, and his non-appointment to the Supreme Court, offers its own lessons on why political affiliation should not be a job requirements for a lawyer, or a judge).

governmental attorneys.[13] Fair game includes, as in the present case, low level staff attorneys (even where higher level attorneys are given protection and retained); attorneys who are protected by a state civil service system; attorneys who are competent, strictly professional and totally apolitical in their professional work; and attorneys whose only misfortune is occupying a job viewed by a party boss as ripe for an award of patronage. Such a blanket denial of constitutional protection disregards this Court's teachings.

In the Second Circuit, personal affiliation (e.g., favoring friends) is now sufficient to replace a governmental civil servant, and override First Amendment rights. Under *Elrod* and its progeny, this Court permitted termination based only upon political affiliation, and only after heightened scrutiny. The Second Circuit's approach is an invitation to cronyism, with governmental purpose replaced by private interest.[14]

The First Amendment right to speech and political association are the most vital of Bill of Rights protections--central to both personal freedom and democracy. The First Amendment provides the right to say and think what one believes, and to be heard, especially on matters of public concern and governance. And it is the right to be a Democrat, or a Republican. "The First Amendment protects political association as well as political expression." *Elrod, supra,* 427 U.S., at 357 , quoting *Buckley v. Valeo*, 424 U.S. 1, 15 (1976). The Court has made clear that public sector employment cannot ordinarily be conditioned on political affiliation, *Elrod, supra,* political speech, *Board of County Commissioners v. Umbehr*, 116 S.Ct. 2342 (1996), or political support, *O'Hare Truck Service v. City of Northlake*, 116 S.Ct. 2353 (1996).

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[13] The Third Circuit is in agreement with the Second Circuit that governmental attorneys are *per se* exempt policymakers. *See, Ness v. Marshall*, 660 F.2d 517, 521 (3d Cir. 1981)(city solicitors). The Eleventh Circuit has stated that it will provide government attorneys with protection. *See, Cutcliffe v. Cochran*, 117 F.3d 1353 (11th Cir. 1997) (expressing 11th Circuit's view that *Branti* would not permit the political patronage discharge of assistant United States attorneys).

[14] Cronyism not only includes hiring unqualified political hangers-on. It also includes the hiring of "friends" (personal, business) or the children of judges or other important officials in order to win friendship. Public attorney jobs are particularly ripe for such non-political, non-ideological (and constitutionally unjustified) patronage.

The teachings of this Court make clear that public employees retain their First Amendment rights, and are protected from "political firings," except under limited circumstances. A politically based firing must support a "vital and paramount" interest, and be necessary for governmental purposes. *Elrod, supra,* 427 U.S., at 362. Much more is required than the "merely showing of legitimate state interest." *Id.* Rather, "exacting scrutiny" is required. *Id.* Doubtful situations must be resolved in favor of the petitioner. *Id.*, 427 U.S., at 368. Moreover, this Court has made it unequivocally clear that in political firing situations, the burden is on respondents to establish that, in balancing the respective interests of the parties, the petitioner's fundamental First Amendment rights should yield to the greater public interest. It is the government's burden to "demonstrate an overriding interest in order to validate an encroachment on protected interests." *Elrod*, 427 U.S., at 368. (emphasis added) As stated in *Branti v. Finkel*, 445 U.S. 507, 518 (1980):

> "the ultimate inquiry is ... whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." (emphasis added).

As conceded by respondents in *Gordon*, petitioner was unquestionably fired on political grounds—for respondent officials to dole out patronage—and this was the basis for decision both in *Gordon* and the present case. Yet respondents agree with petitioner that political affiliation was irrelevant to petitioner's municipal job. They deny that politics played a role in the firings, and they claim that appointments are based upon merit and professional competence. As stated by County Executive Vanderhoef: "Politics doesn't matter in these appointments—the only thing that matters is merit." *See, supra.* Respondents admit that they did not know the party affiliation of the attorneys they fired, or the replacement attorneys they hired.

This view is consistent with the conversion of a part-time assistant county attorney job into a full-time job, with the full-time job having complete civil service protection. Petitioner should have received protection as well, against politically-influenced discharge. It was unadulterated hypocrisy for respondents to argue to the Second Circuit in *Gordon* that political affiliation and "shared ideology" was necessary for the office of "assistant county attorney," while contemporaneously bestowing protection upon the patronage hirees.

The Second Circuit ignores the fact that respondents have not,

and cannot, constitutionally justify their patronage discharge of petitioner. If, as respondents exclaim, politics was irrelevant to the personnel action, then there was no constitutional justification for firing all the Democratic part-time attorneys. The lower courts holdings in this and similar cases cannot be left standing, where the infringement upon First Amendment rights is so palpable.

The Second Circuit forgets what other circuits recognize as fundamental, that "[p]olitical association is at the core of the First Amendment, and even practices that only potentially threaten political association are highly suspect." *McCloud v. Testa*, 97 F.3d 1536, 1552 (6th Cir. 1996). Here, the Second Circuit penalizes association, by sanctioning dismissal of "affiliated" Democrats even where the government employer itself declares that political affiliation is irrelevant to its personnel actions.

B. *"Shared Ideology" Means Chilled Speech*

The Second Circuit's novel "shared ideology" approach also eviscerated public attorneys' right of free speech and thought, by making individual opinion (or silence) a basis for continued public employment. Under its new analysis, formerly protected public employees whose speech (public or private) might reflect, even to a trivial degree, thought or ideology different from that of the municipal employer, or whose silence might fail to reflect shared ideology, can now be fired, and "friends" hired.

Now, if an assistant district attorney is outspoken on a matter of manifest public concern, she nevertheless will have no First Amendment protection, as her public speech will show lack of "shared ideology" with her public employer. *Cf., Connick v. Myers*, 461 U.S. 138 (1983). In the Second Circuit, public employment can now be conditioned upon protected speech and associations. This is constitutionally abhorrent. It chills public discourse and abridges the liberty and associations of citizen-professionals who may choose public service. *See, Perry v. Sindermann*, 408 U.S. 593 (1972); *Pickering v. Board of Education*, 391 U.S. 563 (1968).

The need for certiorari is compelling. This case is of exceptional national importance, because public employees' freedoms of speech and political association, vital to participatory democracy, are being rejected to allow mere cronyism. The rights of public servants, especially professionals hired on the basis of merit, should not be infringed to favor naked patronage without proper governmental

purpose or constitutional justification.

POINT III

This Court must resolve the split among the circuits on case-determinative issues, including whether government lawyer's job description creates *per se* exclusion from First Amendment protection, and if not, whether a jury should decide whether effective job performance requires political affiliation

The Second Circuit's First Amendment views are contrary to those of other circuits on essential issues. It views public attorneys (except assistant public defenders) as categorically unprotected against patronage discharge. *See*, *Bavaro v. Pataki*, 130 F.3d 46 (2d Cir. 1997), *cert denied*, 118 S.Ct. 1801, 140 L.Ed 2d 941 (1998); *Vona v. County of Niagara*, 119 F.3d 201 (2d Cir. 1997); *Gordon*, 110 F.3d 886 (2d Cir. 1997). Paper job descriptions are viewed as dispositive, regardless of case specific circumstances. Thus, these cases never reach a jury, even though it is the jury—local electors—who have the most direct interest in the functioning of their government's civil servants.

Job Description is But One Factor

The crux of the Second Circuit's methodology is that an "attorney" job description creates, *ipso facto*, a First Amendment-exempt policymaking job. As stated by the court of appeals in *Danahy v. Buscaglia*, 134 F.3d 1185 (2d Cir. 1997), "*Gordon* explained that such inquiry presents a question of law informed solely by the job description and the powers of office." 134 F.3d, at 1191, *citing Gordon*, *supra*,110 F.3d, at 888-89)(emphasis added). Under the Second Circuit's approach, First Amendment exemption involves looking only at job description, not actual duties.

Other circuits, on the other hand, have correctly held that the Supreme Court's teachings require an individualized analysis of all relevant factors, including an analysis of duties actually performed, in deciding whether a patronage firing is permissible. This analysis is not limited to mere job description. After all, any shrewd drafter can add "policymaking" language into even a janitor's job description.

Accordingly, the Third Circuit finds it necessary is to "examine the functions performed by the individual occupying the relevant position," because, as stated in *Elrod*, "[t]he nature of the

responsibilities is critical. *Peters v. Delaware River Port Authority*, 16 F.3d 1346, 1353 (3d Cir. 1994); *Waskovick v. Morgano*, 2 F.3d 1292, 1297 (3d Cir. 1993)(emphasis added).

Similarly, the Eleventh Circuit, in *Parrish v. Nikolits*, 86 F.3d 1088, 1093 (11th Cir. 1996), pointedly rejected the Second Circuit's narrow approach. It interpreted *Branti* to require study of "[t]he inherent powers and actual job responsibilities of the position involved, and the relationship of the particular position to the elected official, should be part of the analysis." *Id.*(emphasis added).

It is the Third and Eleventh Circuit cases, not the Second Circuit's, which properly frame *Branti*'s inquiry whether political "party affiliation is an appropriate requirement for effective performance of the public office." 445 U.S. at 518. The Third and Eleventh Circuits examine the totality of job functions, including actual and potential duties, because "effective performance of the public office" requires the public employee to satisfactorily discharge all relevant duties, actual or inherent. The Second Circuit's instruction that courts should only consider potential duties is much too narrow—it means that a janitor's or groundskeeper's potential policymaking becomes dispositive. This Court must resolve the conflict between the circuits.

Focusing on job description alone, the Second Circuit has developed an impenetrable barrier to public attorneys' vindication of constitutional rights. Though simplistic, using job description creates unprincipled decisions, as demonstrated in the present case and *Gordon*, where only the most junior, least "policymaking", attorneys were fired, notwithstanding their civil service status, and where all senior staff attorneys remained.

Let the Jury Decide

The Second Circuit, contrary to other circuits, withholds for itself the right to rule on the constitutional exemption as a matter of law, preventing its presentation as an issue of fact reserved for a jury. In so doing, it is improperly hoarding factual decisionmaking on issues which directly affect governance.

Other circuits respect the right to trial by jury regarding the "policymaking" issue in these First Amendment cases. They disagree with the Second Circuit, and view the *Branti* test as one of fact, not law. As stated by the Seventh Circuit in *Soderbeck, supra*, 752 F.2d 285, 289:

> "Rightly or wrongly, our system commits the decision of complex as well as simple facts, facts tinctured with legal or policy significance ... to the jury in cases in which a right to a jury trial is given."

See also, Nebolny v. Painter, 653 F.2d 1164, 1169-70 (7th Cir., 1981)("it was for the trier of fact to determine whether [plaintiff] was a policymaker.")

The Second Circuit has ruled against the First Amendment claim of each public attorney to come before it, without sanctioning a jury trial in any of these litigations.[15] *See*, *Bavaro v. Pataki*, 130 F.3d 46 (2d Cir. 1997); *Vona v. County of Niagara*, 119 F.3d 201 (2d Cir. 1997); *Gordon*, 110 F.3d 886 (2d Cir. 1997). The *Gordon* case reached a jury , and the jury rendered a verdict in favor of the public attorneys, specifically finding under the *Branti* formulation that political affiliation was not an appropriate requirement for effective job performance.[16] Nevertheless, the Second Circuit reversed, retrieving for itself the determination of facts, jealously keeping for itself the factfinding role which our legal system intends for the jury.

And where, as in the present case, absolutely no evidence was presented opposing petitioners averments or proof,[17] the Second Circuit nevertheless upheld the district court's dismissal as a matter of law, denying a jury before the case even reached discovery.

Categorical Rule of Exclusion

The Second Circuit has developed a categorical rule of exclusion regarding public attorneys. Its *per se* rule denying public attorneys First Amendment protection conflicts with that of the Eleventh Circuit, which holds the view that even assistant United States

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[15] See, e.g., Susan Lourde Martin, *A Decade of Branti Decisions*, 39 Am. U. L. Rev. 11, 28 (1989) ("The Second Circuit is openly hostile to expanding the categories of public employees to which *Elrod*/*Branti* protection applies....").

[16] See, *Gordon* petition for certiorari, at App.19.

[17] In fact, petitioner believed himself entitled to summary judgment, and so moved, as respondents did not contradict that petitioner was a low level attorney, without public contact, non-policymaking and non-confidential (as corroborated by a N.Y.S. Public Employee Relations Board determination), non-partisan, and supervised by a department head who was retained, as were all of full-time attorneys except the county attorney.

attorneys are protected against patronage discharge (and undoubtedly encompass assistant county attorneys). *See, Cutcliffe v. Cochran*, 117 F.3d 1353 (11th Cir. 1997). *Cutliffe*, contrary to the Second Circuit's views, upholds the teachings of *Elrod* and *Branti* that even as to attorneys, each case must be decided on its own merits.

As set forth in Point II, *supra,* the Second Circuit's categorical exclusion extends to all public employees who require subjective "shared ideology." If an employee speaks on a matter of public concern, such will reveal a disqualifying lack of "shared ideology," thereby permitting discharge. This constitutionally chilling view conflicts with the Ninth Circuit's protection of the speech of an assistant prosecutor in *Finkelstein v. Bergna*, 881 F.2d 702 (9th Cir. 1989), *opinion withdrawn on other grounds*, 924 F.2d 1449, 1453 (9th Cir. 1991) and of a government lawyer in *Johnston v. Koppes*, 850 F.2d 594 (9th Cir. 1988), both consistent with the teachings of this Court in *Connick*.

In sum, the Second Circuit's hostile approach toward public attorneys' First Amendment rights conflicts with the views of other circuits in important, case-determinative ways. Because this is an area of law vital to both individual civil rights and to democratic governance, certiorari is a necessity.

POINT IV

Governmental retaliation for a citizen's exercise of First Amendment rights, by taking property, is abhorrent to the Constitution and actionable under § 1983

This Court should review the lower courts' rejection, out of hand and without discovery, of petitioner's *prima facie* 42 U.S.C. § 1983 claim of political retribution. Although the amount of money involved is small (approximately $8,000), the precedent of rejecting claims of First Amendment retaliation is dangerous for the civil rights of all.

Petitioner alleges that respondents eliminated earned wage and time accruals because of petitioner's political affiliation. Later, regarding a subsequent independent contract, respondents delayed other contractual payments due petitioner, because of his political affiliation (conveniently paying immediately after the *Gordon* trial was concluded without plaintiff's testimony). These acts are constitutionally impermissible punishment for petitioner's exercise of First Amendment rights, actionable under 42 U.S.C. § 1983. Yet, the

lower courts determined that this retaliation was merely a contractual matter.

The governmental retaliation continued even after petitioner served his amended complaint. Respondents moved for Rule 11 sanctions, based upon petitioner's commencing a lawsuit challenging his patronage dismissal, even where certiorari was being sought in the *Gordon* case, and where the facts as found by the Gordon case were both inaccurate and incomplete. In light of the district court's comments, the chill to first amendment rights, and the right of citizens to petition their government through the courts, is palpable.

Dismissal, without even discovery, was improper. The Supreme Court has made clear that contractual interests cannot be impaired based on a person's speech, *Umbehr*, *supra*, or political affiliation or support, *O'Hare Truck Service*, *supra*. The instant case stands no differently. This Court must intervene in its supervisory role, lest the courts below run roughshod over all "disfavored" parties, such as the *pro se* attorney here.

POINT V

The Second Circuit's view of public attorneys ignores lawyers' ethical obligations

Judges are often appointed based upon political affiliation, but politics should play no part in their judging. The same concept applies to public lawyers. The ABA Code of Professional Responsibility, adopted by the New York State Bar Association, sets forth proper lawyer ethical conduct. *See*, New York Judiciary Law, Appendix. Lawyers should "maintain the integrity of the legal profession," "exercise independent professional judgment," "represent a client completely ... [and] zealously within the bounds of the law" and should "avoid even the appearance of professional impropriety."

All these ethical mandates counsel that political affiliation must have no bearing on representing a municipal client. However, the Second Circuit presumes the opposite. Its view, based upon ordinary "attorney" job descriptions, is that a professional governmental lawyer will ineffectively carry out duties assigned based upon his or her political bias. This is an unsupported notion which runs against

professional ethics, lawyer advocacy,[18] and common sense. Inadequate performance should result in discharge, political beliefs should not. This Court has rejected a presumption of disloyalty as to subordinate employees, and no different rule should apply to attorneys. As this Court stated in *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 74 (1990):

> "[a] government's interest in securing employees who will loyally implement its policies can be adequately served by choosing or dismissing certain high-level employees on the basis of their political views."

Here, no changes were politically necessary for the higher-ranking officials (the solid waste department head, or all senior staff attorneys), and no justification offered for the removal of their subordinate, the petitioner. To permit dismissal by assuming political affiliation infects attorney performance suggests that professional ethics are meaningless.

Respondents should have considered that "a lawyer who is a public officer … should not engage in activities in which his personal or professional interests are or for suitably may be in conflict with his official duties." See, Ethical Consideration 8-8. Thus, activities which would likely result in political largess, including granting naked patronage to politically supportive attorneys, must be viewed as unethical and improper. After all, how does the new attorney pay the "debt" owed for the political favor?

Petitioner, on the other hand, has pursued his case mindful of Canon 8, which states, in part, that:

> "[O]ur legal system should function in a manner that commands public respect. By reason of education and experience, lawyers are especially qualified to initiate corrective measures therein."

If a lawyer believes that the existence of a rule of law,

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[18] Court have not suggested that lawyers need be criminal to represent criminals, female to represent women, or minority to represent minorities. Democratic attorneys represent a republican, and vice versa, in every court in the nation, each day. Why should public employment be different?

substantive or procedural, causes or contributes to an unjust result (as when attorneys are fired solely because of their political affiliation, and the public misled about this) he should endeavor by lawful means to obtain appropriate changes in the law. *See*, Ethical Consideration 8-2.

As with judges, inadequate performance by lawyers should result in discharge. However, political belief or affiliations in itself must not, at least absent demonstration of a compelling governmental interest.

POINT VI

The Constitution's article IV, § 4 guarantee of a "republican form of government" is impaired, and participatory democracy undermined, when the federal courts allow a municipality to intentionally deceive the public regarding local governance

The Guarantee Clause assures to the citizens of the several states a "republican form of government." *See*, Art. IV, § 4. While most commonly this issue involves a non-justiciable political question, sometimes, as here, it does not.

First, the Court should grant certiorari to review the court of appeal's violation of the Guarantee Clause, by its refusal to respect New York's constitutional and statutory mandate that civil servants be hired, and fired, only based upon merit. As set forth at Point I, *supra*, where the people of a State, through their elected officials, decide that non-exempt civil servants shall not be adversely affected by political influences, the federal courts should be loath to nullify such democratic choice.

Second, democracy cannot operate from an uninformed, or wrongly informed, electorate. "Informational gerrymandering" is no less invidious than racial gerrymandering—both dilute the power of voters. This Court has affirmed the notion that governmental misrepresentation of the electorate may violate the Guarantee Clause. *See, e.g., Burger v. Judge*, 364 F.Supp. 504 (D. Montana 1973), *affirmed*, 414 U.S. 1058 (1973). Misleading voters on a ballot may deprive the electors of their right to vote, and thus create a justiciable Guarantee Clause controversy. *See*, *Kohler v. Tugwell*, 292 F.Supp. 978 (E.D.La. 1968), *affirmed*, 393 U.S. 531 (1969); see also, *Reynolds v. Sims*, 377 U.S. 533, 582 (1964). Misleading voters

regarding civil service personnel decisions is not a trivial matter. Rather, it involves what is most important to government—who does the people's work.

In this case, the federal courts' action in dismantling New York's merit system of civil service, and condoning municipal misrepresentations regarding civil service employees, has subverted participatory democracy. The federal courts have permitted deception of the local electorate, and in so doing have damaged the citizenry's right to a republican form of government. Without truth, democracy cannot survive.

The Guaranty Clause issue is novel, important, and warrants a grant of certiorari.

POINT VII

Bright lines can be drawn, which will inform the courts, local government, public servants and the public when patronage firings are permissible

No better case exists than the present one, and none better will likely arise soon, to define the important First Amendment and federalism issues at issue here, and to create "bright lines" assisting local governments and the courts in defining the respective rights of civil servants, local government, local politicians, the legal profession, and most importantly, the public. Bright lines are needed,[19] and instructive lines can be drawn here.[20]

First, the Court can draw the bright line by affirming that non-exempt civil servants are entitled to the federal First Amendment protection promised by the state civil service system. State civil service laws can, and should, be used to properly define when partisanship is needed in public employment.

Next, the Court can reaffirm that hiring government has the burden of demonstrating—for the public employee, for the electorate,

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[19] Comment, *Conduct and Belief: Public Employees' First Amendment Rights to Free Expression and Political Affiliation*, 59 U.CHI. L.REV. 897 (1992).

[20] *Cf. Rutan, supra*, 497 U.S. 62, 113 (Scalia, J. dissent)(regarding patronage issue, "there is no right line... or at least [none] that can be nationally applied and that is known by judges.").

and if litigation ensues, for the courts—a justifiable basis for political discharge under the teachings of *Elrod, Branti* and *Rutan*. The Third Circuit, in *Waskovick v. Morgano*, 2 F.3d 1292,1297 (3d Cir. 1993), has offered a sound guideline for analyzing patronage discharge case: whether a difference in political affiliation is "highly likely to make the employee ineffective." Such a test is consistent with the need for heightened scrutiny and a "compelling" showing to override First Amendment rights. *Cf.*, *Peters*, *supra*, 16 F.3d, at 1361 (dissent). Even a less rigorous test will provide the courts of appeal with necessary direction.

Finally, the Court's intervention is necessary to protect public employees' federal right to a trial by jury, especially where reasonable minds might differ. A jury of citizens, not an unelected judiciary, is most appropriate for deciding whether the public's civil servants should be governed by partisan politics and cronyism, or by professionalism and merit.

Conclusion

Certiorari is needed, on behalf of all lawyers in public service, because of the profound danger to America's participatory democracy if public servants are not assured of First Amendment freedoms of political affiliation and free speech. Local officials must not be allowed to misrepresent the public on matters essential to their informed self-governance. The federal courts must not disregard core principles of federalism, by ignoring state civil service law and the First Amendment protections it affords. Without the Court's review, democracy itself is harmed.

Accordingly, the grant of a writ of certiorari is respectfully requested.

Dated: *March 14, 1999*

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For Petitioner

APPENDIX A

MICHAEL D. DIEDERICH, JR., Plaintiff-Appellant, v. THE COUNTY OF ROCKLAND, C. SCOTT VANDERHOEF, County Executive; PAUL NOWICKI, County Attorney, Defendants-Appellees.

No. 98-7668

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

1998 U.S. App. LEXIS 31460, December 15, 1998, Decided

COUNSEL: Appearing for Appellant: Michael D. Diederich, Jr., *Pro Se*, Stony Point, New York. Appearing for Appellees: John D. Winter, Patterson, Belknap, Webb & Tyler, New York, New York.

JUDGES: Present: HONORABLE RALPH K. WINTER, Chief Judge, HONORABLE JAMES L. OAKES, HONORABLE DENNIS JACOBS, Circuit Judges.

OPINION: SUMMARY ORDER

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the district court is hereby AFFIRMED.

Michael D. Diederich, Jr. appeals from Judge Parker's dismissal of his amended complaint pursuant to Fed. R. Civ. P. 12(b)(6). We review such dismissals de novo. See *First Nationwide Bank v. Gelt Funding Corp., 27 F.3d 763, 765 (2d Cir. 1994).*

Appellant's claim involves precisely the same factual and legal arguments that we recently rejected in *Gordon v. County of Rockland, 110 F.3d 886* (2d Cir.), cert. denied, *139 L. Ed. 2d 34, 118 S. Ct. 74 (1997).* He contends that his case is distinguishable because the Gordon court was unaware that part-time assistant attorneys are classified as non-competitive under state civil service law. He further contends that had this fact been disclosed to, or fully appreciated by, this court, we would have held that assistant county attorneys are per se protected from politically motivated dismissal.

The job description, title, and status of the Gordon plaintiffs were part of the record in that case, and we see no evidence that the panel was unaware of the Gordon plaintiffs' classification or status as non-competitive under New York law. In any event, civil service protection is only one factor to be considered in determining whether

a public employee is protected by the First Amendment from a political dismissal. We stated in *Vezzetti v. Pellegrini, 22 F.3d 483, 486 (2d Cir. 1994),* that no one factor is dispositive. Furthermore, we have held that "[the Vezzetti factors] should not be mechanically applied, nor should they begin and end the analysis." *Bavaro v. Pataki, 130 F.3d 46, 50 (2d Cir. 1997), cert. denied, __ U.S.__ , 118 S. Ct. 1801, 140 L. Ed. 2d 941 (1998)* (internal quotation marks omitted).

As Gordon noted, courts have almost uniformly denied First Amendment protection to attorneys in positions comparable to that of appellant. "All circuit court decisions -- and almost all other court decisions -- involving attorneys in government service, other than public defenders, have held that *Elrod/Branti* do not protect these positions." *Gordon, 110 F.3d at 890-91* (internal quotation marks omitted); *see also, Cudd v. Aldrich, 982 F. Supp. 463, 466 (S.D. Tex. 1997)* ("Other circuits . . . have concluded that assistant district attorneys and other government attorneys do occupy positions requiring political loyalty, and are accordingly not entitled to First Amendment protection for political dismissals."); *Williams v. City of River Rouge, 909 F.2d 151, 155 (6th Cir. 1990)* ("Courts that have decided whether city and county attorneys are so protected [from First Amendment exemption] have almost uniformly found that they are not.").

We therefore reject appellant's First amendment claim for substantially the reasons stated in *Gordon*. See *Gordon, 110 F.3d at 889-92, 892* (holding that "Assistant Rockland County Attorneys are . . . exempt from First Amendment protection against politically motivated dismissal").

Appellant also contends that the district court improperly dismissed his unconstitutional takings claim involving his accrued holiday, personal, and sick time. We reject this claim for substantially the reasons stated by the district court. See *Diederich v. County of Rockland, 999 F. Supp. 568, 572-73 (S.D.N.Y. 1998).*

We have examined appellant's other claims and have determined them to be meritless. Because appellant's federal claims were dismissed, the district court properly declined jurisdiction over his state law contract claim. See *Lennon v. Miller, 66 F.3d 416, 426 (2d Cir. 1995).*

We therefore affirm.

APPENDIX B

MICHAEL D. DIEDERICH, JR., Plaintiff, v. THE COUNTY OF ROCKLAND, C. SCOTT VANDERHOEF, COUNTY EXECUTIVE, and PAUL NOWICKI, COUNTY ATTORNEY, Defendants.

97 Civ. 1385 (BDP)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK,

999 F. Supp. 568; 1998 U.S. Dist. LEXIS 4467

April 3, 1998, Opinion Filed

COUNSEL: Michael D. Diederich, Jr., Esq., Plaintiff, *Pro Se*, Stony Point, NY. John D. Winter, Esq., Patterson, Balknap, Webb & Tyler, New York, NY, for Defendants.

OPINION: MEMORANDUM DECISION AND ORDER

BARRINGTON D. PARKER, JR., U.S.D.J.

Plaintiff Michael Diederich, Jr., acting pro se, brings this action asserting that he was discharged from his position as a part-time Rockland County Assistant County Attorney in violation of his rights under the First, Fifth, and Fourteenth Amendments to the United States Constitution; and in violation of his due process and equal protection rights under the New York State Constitution, New York State Executive Law § 296, New York Public Officers Law, and New York Civil Service Law.

Diederich also seeks taxpayer relief on the grounds that "democracy" and the "republican form of government" are harmed when political patronage serves as the basis for public employment decisions, and that taxpayers are harmed by government deception in representing that political patronage does not influence personnel decisions. Defendants have moved to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure and for Rule 11 sanctions. Diederich cross-moves for summary judgment on an unasserted breach of contract claim and his claim under the First Amendment. Diederich also moves for disqualification of the defense attorneys and for permission to file a supplemental complaint asserting retaliation against him in violation of his First and Fifth Amendment rights under the United States Constitution. For the reasons stated below, defendants' motion to dismiss is granted and their motion for Rule 11

sanctions is denied. Plaintiff's motions to file a supplemental complaint and for summary judgment on his First Amendment claims are denied.

I. Diederich's First Amendment Claim

Diederich's claim arises from the precise facts and relies upon the same legal arguments only recently rejected by the Court of Appeals in *Gordon v. County of Rockland, 110 F.3d 886 (2d Cir. 1997)*, cert. denied, *U.S. , 139 L. Ed. 2d 34, 118 S. Ct. 74 (1997)*. In Gordon, as here, the plaintiffs were Assistant County Attorneys in Rockland County who were terminated when Paul Nowicki was elected Rockland County Executive in 1993. *Id. at 887.* Plaintiffs brought suit against Vanderhoef, Nowicki, and Rockland County under *42 U.S.C. § 1983*, alleging that their dismissal was politically motivated and violated the First Amendment. Id. The Court found that the attorneys served as legal advisors to the various departments of county government for which they worked, and represented the County in that capacity. *Id. at 888.* Applying the factors set forth in *Vezzetti v. Pellegrini, 22 F.3d 483 (2d Cir. 1994)* to determine whether the plaintiffs were entitled to first amendment protection against politically-motivated dismissal, the Gordon Court held that "Assistant Rockland County Attorneys are . . . exempt from First Amendment protection against politically motivated dismissal." *110 F.3d at 891.*

The Gordon holding applies with equal force to this case. Diederich attempts to factually distinguish his job from that of the Gordon plaintiffs, and contends that although he held the designation "assistant county attorney," he, in practice, worked for the Department of Solid Waste. Diederich, however, ignores the fact that the Gordon court addressed this question and concluded: "The idea that job performance (rather than job description) should control Elrod-Branti analysis has been consistently rejected by this court and others." *Id. at 888.* Thus, the written description of plaintiff's job controls.[1] See also *Meeks v. Grimes, 779 F.2d 417, 419 n.1 (7th Cir.*

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[1] While both parties have submitted materials outside the pleadings, I have considered only two: the County's written Assistant County Attorney job description and the Retainer Agreement signed by plaintiff describing plaintiff's duties. Although these documents are matters outside the pleadings, this Court may consider them on a motion to dismiss because plaintiff had prior notice of them. See *Cortec Industries,*

1985) ("our focus is on the 'inherent powers' of the office, not what any individual officeholder actually does").

Like the plaintiffs in Gordon, Diederich was charged with the "responsibility for representing the county in court cases and in the performance of other legal work." Listed among his work activities were: "Researches the law and renders opinions to the County Legislature and department heads as directed by the County Attorney." As the Gordon court found, such duties make it "difficult to fathom how such responsibilities can be undertaken and done well without . . . 'political or social philosophy [making] a difference in the implementation of programs.'" *Gordon, 110 F.3d at 890* (quoting *Savage v. Gorski, 850 F.2d 64, 69 (2d Cir. 1988)).*

Further, while Diederich attempts to distinguish Gordon on the grounds that defendants are now transforming assistant county attorneys into permanent civil service employees, this argument is irrelevant to Diederich's claims.[2] It is undisputed that when Diederich was employed as a part-time assistant county attorney, he did not have civil service protection. This Court finds, therefore, that Gordon v. County of Rockland is fully applicable to Diederich's claims. Diederich's First Amendment claims are therefore dismissed, as political affiliation was an allowable basis for Diederich's discharge.[3] Accordingly, I also deny Diederich's motion for summary judgment on his First Amendment claims.

II. Due Process Claim

Inc. v. Sum Holding L.P., 949 F.2d 42, 48 (2d Cir. 1991) ("A finding that plaintiff has had notice of documents used by defendant in a 12(b)(6) motion is significant since . . . the problem that arises when a court reviews statements extraneous to a complaint generally is the lack of notice to the plaintiff that they may be so considered; it is for that reason--requiring notice so that the party against whom the motion to dismiss is made may respond--that Rule 12(b)(6) motions are ordinarily converted into summary judgment motions").

[2] One of the factors to consider under analysis set forth in Vezzetti is whether the party in question was entitled to civil service protection.

[3] Because political affiliation was a permissible basis for Diederich's discharge, I also dismiss Diederich's Claim for Violation of People's Right to a Republic Form of Government, which asserts in relevant part that "it directly harms democracy, and the republican form of government, . . . for public employment decisions to be made on the basis of political patronage."

Because Diederich's dismissal was permissible, his Fifth and Fourteenth Amendment due process claims, asserting that he was terminated without notice, hearing, or just cause, must be dismissed as well. In order to establish a valid claim for deprivation of procedural due process, Diederich must show that he had a property interest in his position and was deprived of that interest. *Dwyer v. Regan, 777 F.2d 825, 829 (2d Cir. 1985).* In order "to have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it." *Bd. of Regents of State Colleges v. Roth, 408 U.S. 564, 577, 33 L. Ed. 2d 548, 92 S. Ct. 2701 (1972).* In the realm of public employment, our Circuit has held that "a property interest arises only where the state is barred whether by statute or contract, from terminating (or not renewing) the employment relationship without cause." *S & D Maintenance Co., Inc. v. Goldin, 844 F.2d 962, 967 (2d Cir. 1988).*

Diederich has not sufficiently alleged a property interest in his position, which was not civil service protected, and at which he served at the pleasure of the County Attorney. N.Y. County Law § 502 (McKinney 1991). Rather, he alleges only that "Upon information and belief, terminating a public servant's employment without articulating that this was done for reasons of political party affiliation potentially stigmatizes the employee and deprives the employee of legitimate interest in not being arbitrarily deprived of employment." Further, because the Gordon Court held that dismissal of an Assistant Rockland County Attorney on the grounds of political affiliation did not deprive plaintiffs of any constitutional right, Diederich's due process claim is dismissed as well.

III. Equal Protection Claim

Diederich also asserts an equal protection claim, contending that by subjecting him as a part-time assistant county attorney to a political firing, the defendants have violated his rights to equal protection.[4] Because the right to be free from political discharge involves neither a suspect class nor a fundamental right, defendants' decision should be judged under the rational basis standard. See, e.g., *Moccio v. New York State Office of Court Administration, 95 F.3d*

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[4] Diederich contends that full-time Assistant County Attorneys were not subjected to political firings

195, 201 (2d Cir. 1996). A classification involving neither fundamental rights nor proceeding along suspect lines is "accorded a strong presumption of validity." *Heller v. Doe, 509 U.S. 312, 319, 125 L. Ed. 2d 257, 113 S. Ct. 2637 (1993).* Under this standard, "a classification 'must be upheld against equal protection challenges if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.'" *Id., 509 U.S. at 320* (quoting *F.C.C. v. Beach Communications, Inc., 508 U.S. 307, 313, 124 L. Ed. 2d 211, 113 S. Ct. 2096 (1993)).*

Here, Diederich, a part-time assistant county attorney, was allegedly discharged for his political affiliation. In his complaint, he states that "there is no rational basis for distinguishing between full time and part-time attorneys, in terms of permissibility for discharge for political affiliation." As defendants correctly point out, however, Diederich himself provides a rational basis for such distinction, in that "all or most of the full-time assistant county attorneys employed in the Office of the Rockland County Attorney hold civil service titles in addition to their positions as assistant county attorneys." Because civil service protection is a factor to consider in determining whether an employee is entitled to protection from discharge on the basis of political affiliation, Diederich has thus provided a basis for distinguishing between full and part-time employees with respect to discharge for political affiliation. See *Gordon v. County of Rockland, 110 F.3d at 889* (citing *Vezzetti v. Pellegrini, 22 F.3d 483, 486 (2d Cir. 1994)).* Diederich's equal protection claim is therefore dismissed.

IV. Claim for Unconstitutional Taking

Diederich claims that defendants interfered with his accrued holiday, personal, and sick time in breach of his contract with the County and because of his political firing. He thus asserts a claim for "unconstitutional takings" under the First, Fifth, and Fourteenth Amendments to the United States Constitution.

"Unconstitutional takings can occur two ways. First, a property owner may suffer a physical invasion or permanent occupation of a property. . . . Second, a regulatory scheme may result in a compensable taking without a physical invasion where the regulatory scheme goes 'too far.'" *Meriden Trust and Safe Deposit Co. v. F.D.I.C., 62 F.3d 449, 454 (2d Cir. 1995).* Diederich does not allege that any state regulatory scheme resulted in a taking of his property; rather, he bases his takings claim on his alleged loss without

compensation of vacation time, personal, holiday, and sick leave time accruals, and retirement credit. In order to maintain an action for an unlawful taking, Diederich must therefore show that his loss of accrued time amounted to "a physical invasion or permanent occupation of a property," and that his interest in his time accruals amounted to a property interest.

What constitutes a "property interest" is not always well defined. In this case, Diederich alleges that the failure to pay him for his accrued time was in breach of his contract with the County. His unlawful takings claim is thus based on his underlying state contract action.[5] Our circuit, however, has hesitated to extend property protection to contractual rights. See, e.g., *S & D Maintenance Co., Inc. v. Goldin, 844 F.2d 962 (2d Cir. 1988)* (holding that claims for payment under City contract for services already rendered did not rise to constitutionally protectible property interest: "the doctrinal implications of constitutionalizing all public contract rights would raise substantial concerns"). Instances in which contractual rights have been protected as property interests are limited, but occur, for example, "in connection with a state's revocation of status, an estate within the public sphere characterized by a quality of either extreme dependence in the case of welfare benefits, or permanence in the case of tenure, or sometimes both, as frequently occurs in the case of social security benefits." *Id. at 966.* Diederich's interests in his time accruals, however, do not rise to such levels. I therefore dismiss Diederich's claim for unconstitutional taking.

V. Claim for Taxpayer Relief for Governmental Deception

Diederich also asserts a claim for taxpayer relief for what he terms "governmental deception," asserting that the defendants did not expressly advise new county attorneys that they may be terminated on the basis of political affiliation. He further alleges that "it is deceitful to the public to represent that political affiliation and patronage is not applied to a new administration's hiring and firing of personnel, when in fact personnel decisions are made on the basis of such political affiliation and patronage[,]" and contends that "Upon information and belief, such deception ultimately costs the taxpayer money."

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[5] Indeed, Diederich recognizes that a favorable disposition of his breach of contract claim under state law would moot his constitutional claim.

In order to challenge governmental action in one's capacity as a taxpayer, the party asserting taxpayer standing must show "a logical nexus between the [taxpayer] status asserted and the claim sought to be adjudicated." *Flast v. Cohen, 392 U.S. 83, 103, 20 L. Ed. 2d 947, 88 S. Ct. 1942 (1968).* The party must also demonstrate that:

> (1) they personally suffered some actual or threatened injury as a result of the defendant's putatively illegal conduct; (2) the injury fairly can be traced to the challenged action; and (3) the injury is likely to be redressed by a favorable decision.

DeStefano v. Emergency Housing Group, Inc., 1997 WL 473283, *4 (S.D.N.Y. Aug. 1, 1997) (quoting *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 472, 70 L. Ed. 2d 700, 102 S. Ct. 752 (1982)).*

Diederich has failed to show the requisite link between the defendants' conduct and any injury to either himself or taxpayers generally. In support of his claim, Diederich offers only speculative statements, based "upon information and belief" and makes no concrete showing of any injury, much less an injury connected to the defendants' actions. Further, because defendant's conduct in discharging plaintiff on account of political affiliation was permissible, there can be no harm to the taxpayers as a result. Plaintiff's claim for taxpayer relief is therefore dismissed as well.

VI. Motion to File Supplemental Complaint

Diederich seeks leave to file a supplemental complaint, on the grounds that defendants' litigation activities in response to Diederich's lawsuit were designed to retaliate against Diederich, in violation of his First and Fifth Amendment rights.[6] Diederich, however, offers no support for his novel claim that a motion for sanctions can constitute actionable retaliation or rise to the level of infringement of a constitutional right. In view of the symmetry between this case and Gordon and based on the fact that defendants' asserted defenses and pleadings were contemplated by the Federal Rules of Civil Procedure and were well within the bounds of appropriate advocacy, Diederich's

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[6] Specifically, Diederich decries defendants' invocation of the Code of Professional Responsibility in seeking disqualification and sanctions against Diederich for his now withdrawn solid waste management taxpayers' action, and their request for Rule 11 sanctions.

motion to file a supplemental complaint is denied.

CONCLUSION

Defendants' motion to dismiss is granted. The Clerk of the Court is directed to enter judgment for defendants dismissing, with prejudice, plaintiff's federal claims. Plaintiff's motions for summary judgment on his First Amendment claim and to file a supplemental complaint are denied. In view of the dismissal of plaintiff's federal claims, this Court declines to entertain his state claims. See, e.g., *Salim v. Proulx, 93 F.3d 86, 92 (2d Cir. 1996); Lennon v. Miller, 66 F.3d 416, 426 (2d Cir. 1995).* Accordingly, Diederich's motions for partial summary judgment on his state law breach of contract claim and to disqualify defense attorneys will not be addressed. With respect to defendants' motion for Rule 11 sanctions, I note that while the plaintiff in this case approaches the boundaries of sanctionable conduct, I decline at this time to award sanctions. Defendants' motion for Rule 11 sanctions is therefore denied.

SO ORDERED:
BARRINGTON D. PARKER, JR.
U.S.D.J.
Dated: White Plains, NY
April 3, 1998

APPENDIX C

MICHAEL D. DIEDERICH, JR., Plaintiff, v. THE COUNTY OF ROCKLAND, C. SCOTT VANDERHOEF, COUNTY EXECUTIVE, and PAUL NOWICKI, COUNTY ATTORNEY, Defendants.

97 Civ. 1385 (BDP)

Judgment

[U.S. District Court WP, filed April 7, 1998S.D.of N.Y.]

Whereas the above entitled action having been assigned to the Honorable Barrington D. Parker, Jr., U.S.D.J., and the Court thereafter on April 3, 1998 having handed down its Memorandum Decision and Order granting defendant's motion to dismiss, dismissing with prejudice, plaintiff's federal claims, denying plaintiff's motion for summary judgment on his First Amendment claim, denying plaintiff's motion to filed a supplemental complaint of, and in view of the dismissal of plaintiff's federal claims, this Court declined to entertain his state claims. See, e.g., Salim v. Proulx, 93 F.3d 86, 92 (2nd Cir. 1996); Lennon v. Miller, 66 F.3d 416, 426 (2nd Cir. 1995). Accordingly, Diederich's motion for partial summary judgment on his state law breach of contract claim and to disqualify defense attorneys will not be addressed. With respect to defendants' motion for Rule 11 sanctions, the Court notes that while plaintiff in this case approaches the boundaries of sanctionable conduct, the Court declines to award sanctions. Defendants' motion for Rule 11 sanctions is therefore denied, and it is,

ORDERED, ADJUDGED AN AGREED: that defendant's motion to dismiss is granted. Plaintiff's federal claims are dismissed with prejudice. Plaintiff's motions for summary judgment on his First Amendment claim and to file a supplemental complaint are denied. In view of the dismissal of plaintiff's federal claims, this Court declined to entertain his state claims. Accordingly, Diederich's motions for partial summary judgment on his state law breach of contract claim and to disqualify defense attorneys will not be addressed. Defendants' motion for Rule 11 sanctions is denied.

Dated: White Plains, New York
April 7, 19988 [sic]

/s/ James M. Parkinson
Clerk

(2)

No. 98-1487

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

MICHAEL D. DIEDERICH, JR.,

Petitioner,

v.

THE COUNTY OF ROCKLAND; C. SCOTT VANDERHOEF, COUNTY EXECUTIVE and PAUL NOWICKI, COUNTY ATTORNEY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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QUESTION PRESENTED

Whether a decision by the United States Court of Appeals for the Second Circuit holding that the First Amendment does not protect petitioner, an assistant county attorney, from a politically-motivated dismissal should be reviewed by this Court even though the decision below neither presents a novel question of federal law, nor conflicts with any decision of this Court or of any other circuit.

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1 Ronald Rotunda & John Nowak, *Treatise on Constitutional Law*, § 3.4 (2d ed. 1992 & Supp. 1999) 25

Respondents respectfully request that this Court deny the petition for a writ of certiorari seeking review of the Second Circuit's opinion below. That unpublished opinion is at 1998 U.S. App. LEXIS 31460 (2d Cir. Dec. 15, 1998) and is reprinted in the petition for certiorari at Appendix A. Petitioner, Michael Diederich, grossly distorted the facts relevant to the powers, responsibilities and status of assistant county attorneys in Rockland County in his petition because as detailed below, Mr. Diederich held a confidential, policy making position. Accordingly, party affiliation was an appropriate requirement for effective performance of his job.

This action arises from precisely the same facts that gave rise to the Second Circuit's opinion in *Gordon v. County of Rockland*, 110 F.3d 886 (2d Cir.), *cert. denied*, __ U.S. __, 118 S. Ct. 74 (1997). The primary issue here, as in *Gordon*, is whether applying this Court's rulings in *Elrod v. Burns*, 427 U.S. 347 (1976) and its progeny, a confidential, policy making assistant county attorney is protected by the First Amendment from a politically-motivated dismissal. The answer of *all* the circuit courts that have directly addressed this issue is an unequivocal "no."

There is no cause for this Court's review of the conclusion below that Mr. Diederich was not entitled to First Amendment protection from dismissal.

STATEMENT OF THE CASE

In June 1992 Mr. Diederich was hired by Rockland County on a part-time basis as an environmental lawyer, with the title of Assistant County Attorney. (JA 21).[1] By statute, Mr. Diederich

1. Because the appendix submitted by Mr. Diederich does not fully recite the factual record, citations to "JA __" refer to the more complete Joint Appendix submitted to the Second Circuit.

employment was at the pleasure of the County Attorney and revocable at any time. N.Y. County Law § 502 (McKinney 1991 & Supp. 1998) ("[a]ny such appointment may be revoked by the county attorney at any time"). Moreover, for purposes of financial disclosure, as an assistant county attorney, Mr. Diederich was designated as a "policymaker" by the Rockland County Legislature. *See Laws of Rockland County*, Code of Ethics, § 66.11.1, Schedule A(D)(2) (1992).

According to the job description current at the time of Mr. Diederich's hiring, the duties and responsibilities of a Rockland Assistant County Attorney included:

> **DISTINGUISHING FEATURES OF THE CLASS:**
>
> This is professional legal work of a complex legal nature involving the responsibility for representing the County in court cases and in the performance of other legal work. General supervision is received from the County Attorney. Does related work as required.
>
> **TYPICAL WORK ACTIVITIES:**
>
> Researches the law and renders opinions to the County Legislature and department heads as directed by the County Attorney;
>
> Prepares pleadings, appeals, resolutions, notices, contracts and other legal papers and documents;
>
> Examines legal papers served on or filed with County departments; Appears in Court or at hearings to represent the County.

FULL PERFORMANCE KNOWLEDGE, SKILLS, ABILITIES AND PERSONAL CHARACTERISTICS:

Good knowledge of the principles and practices of law, particularly as concerned with the organization and operation of County departments and agencies; ability to express arguments of the law by written and spoken words; ability to deal effectively with people; physical condition commensurate with the demands of the position.

MINIMUM QUALIFICATIONS:

Possession of a license to practice law in the State of New York.

(JA 49).

Consistent with this job description, in early 1994, Mr. Diederich prepared a summary of his duties and responsibilities which, in pertinent part, states:

> . . . I have been involved in a wide variety of other environmental law matters as the need has arisen. For example, I filed a NEPA lawsuit on the County's behalf in *County of Rockland et al. v. U.S. Army Corps of Engineers* (U.S. District Court, S.D.N.Y. 1993), and have defended the County and its employees in various DEC proceedings. I have also been advising on all aspects of the Court Facilities project, including SEQR. I continue to work closely with the Rockland County Environment Management Council (I was an EMC chairman in the early 1980s).

* * *

Committee, etc., meetings

Solid Waste Management Department — I meet on a regular and ongoing basis with the head of this department.

Solid Waste Management Department, Executive Work Staff — Monthly meetings, an as otherwise scheduled.

Legislative Solid Waste Management Committee — I serve as this committee's counsel.

Legislative Court Facilities Committee — I have been serving as this committee's legal advisor, pending the assignment of another attorney. My initial involvement was on SEQR issues, which involvement I expect should continue.

Legislative Water Quality Committee — I have been serving as counsel to this committee.

Emergency Planning — I have been involved on an "as needed" basis, for example, on Indian Point drills.

Environmental Management Council — I work closely with the EMC, and often attend their meetings.

(JA 47-48).

Assistant county attorneys in Rockland County are under the supervision of the County Attorney, who is appointed by

the elected County Executive. *See Gordon*, 110 F.3d at 891. In November 1993 a Republican was elected as Rockland's County Executive and appointed a Republican, as County Attorney. (JA 22). In March 1994, the County Attorney terminated the employment of Mr. Diederich, a registered Democrat as well as the employment of the plaintiffs in *Gordon*, all of whom were registered Democrats. *Gordon*, 110 F.3d at 887. Mr. Diederich's job description, title, and status are identical to those of the *Gordon* plaintiffs. Mr. Diederich here and each of the part-time assistants in *Gordon*, however, had distinct areas of responsibility and specialization. *See Gordon*, 110 F.3d at 888.

On the basis of the incidents described above, the *Gordon* former assistant county attorneys brought suit alleging that their dismissal was politically motivated and violated the First Amendment. *Gordon*, 110 F.3d at 887. In *Gordon*, following the reasoning of the Supreme Court in *Branti v. Finkel*, 445 U.S. 507 (1980), the Second Circuit held that "rendering legal opinions, drafting ordinances, [and] negotiating contracts — define a position for which party affiliation is an appropriate requirement," *Gordon*, 110 F.3d at 891 (quoting *Ness v. Marshall*, 660 F.2d 517, 521-22 (3d Cir. 1981)), and held that "the Assistant Rockland County Attorneys are . . . exempt from First Amendment protection against politically motivated dismissal." *Gordon*, 110 F.3d at 892. This Court denied the *Gordon* plaintiffs' petition for certiorari.

Mr. Diederich served his action after the Second Circuit ruled in *Gordon*. In his amended complaint Mr. Diederich asserted that his First and Fourteenth Amendment rights were violated when he was terminated from the County's employ. (JA 24, 27). He also asserted that the County's decision to terminate some part-time, but no full-time, assistant county attorneys violated his right to "equal protection." (JA 27-28). In-

addition, Mr. Diederich alleged that the County's supposed failure to pay him certain benefits constituted an unconstitutional taking within the meaning of the Fifth Amendment. (JA 29-30). Mr. Diederich further alleged that dishonesty of elected officials regarding the reasons for his termination "harms democracy and the Republican form of government" and that taxpayers suffered financially due to this deception. (JA 31). Finally, Mr. Diederich alleged that taxpayers suffered because the County failed to meet obligations established in its Solid Waste Management Plan which Mr. Diederich claimed he prepared. (JA 33).

On April 3, 1998 the district court granted respondents' motion to dismiss and denied Mr. Diederich's cross-motion for summary judgment as well as his motion for leave to file a supplemental complaint. *Diederich v. County of Rockland*, 999 F. Supp. 568 (S.D.N.Y.), *aff'd*, 166 F.3d 1200 (2d Cir. 1998). In addition, the district court denied respondents' motion for sanctions, but noted that Mr. Diederich's action "approaches the boundaries of sanctionable conduct. . . ." *Id.* at 574.

On December 15, 1998, the Second Circuit affirmed the dismissal of Mr. Diederich's claims stating that they "involve[ ] precisely the same factual and legal arguments that we recently rejected in *Gordon v. County of Rockland*." (App. 2a).[2] Accordingly, Mr. Diederich's First Amendment claim was rejected "for substantially the reasons stated in *Gordon*." (*Id.*)

The certiorari petition filed by Mr. Diederich is almost identical to the unsuccessful petition in *Gordon*.

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2. Citations to "App __" refer to the appendix submitted by Mr. Diederich.

REASONS FOR DENYING THE WRIT

I.

THE SECOND CIRCUIT'S DECISION DOES NOT RAISE AN IMPORTANT ISSUE THAT CALLS FOR THIS COURT'S REVIEW

A. The Circuits Agree That Similarly Situated Attorneys Do Not Enjoy First Amendment Protection

The precedents upon which the decision below turns are well-settled. In *Elrod*, this Court carved an exception to the general rule that patronage dismissals violate the First Amendment and exempted employees in policy making positions and those privy to confidential matters from First Amendment protection. 427 U.S. at 367. In *Branti*, this Court refined the standard in *Elrod*:

> [T]he ultimate inquiry is . . . whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved.

Branti, 445 U.S. at 518. (hereinafter the "*Branti* standard"). In deciding that assistant public defenders enjoyed protection from patronage dismissals, this Court specifically contrasted the broader public responsibilities of prosecutors. *Branti*, 445 U.S. at 519 n.13.

Though circuit courts have sometimes wrestled with the application of the *Branti* standard, the courts recognize "[t]his difficulty 'is the natural result of the myriad of governmental bodies, departments, and positions, and the varying responsibilities of pubiic employees.' " *Waskovich v. Morgano*,

2 F.3d 1292, 1297 (3d Cir. 1993), quoting *Pounds v. Griepenstroh*, 970 F.2d 338, 341 (7th Cir. 1992), *cert. denied*, 507 U.S. 910 (1993). With respect to attorney positions, however, the circuit courts are uniform in holding that government attorneys are not protected against politically motivated discharges. *See Fazio v. City And County of San Francisco*, 125 F.3d 1328 (9th Cir. 1997), *cert. denied*, __ U.S. __, 118 S. Ct. 1517 (1998); *Americanos v. Carter*, 74 F.3d 138 (7th Cir.), *cert. denied*, 517 U.S. 1222 (1996); *Monks v. Merlinga*, 923 F.2d 423 (6th Cir. 1991); *Williams v. City of River Rouge*, 909 F.2d 151 (6th Cir. 1990); *Clark v. Brown*, 861 F.2d 66 (4th Cir. 1988); *Bauer v. Bosley*, 802 F.2d 1058 (8th Cir. 1986), *cert. denied*, 481 U.S. 1038 (1987); *Livas v. Petka*, 711 F.2d 798 (7th Cir. 1983); *Mummau v. Ranck*, 531 F. Supp. 402 (E.D. Pa), *aff'd per curiam*, 687 F.2d 9 (3d Cir. 1982); *Ness*, 660 F.2d at 522.

This Court should not and need not review each of the decisions that comprise the progeny of *Elrod* and *Branti* as Mr. Diederich suggests because when it comes to government attorneys — who interact with elected officials, represent governmental agencies in important matters and render opinions to County Legislatures — the circuit courts have had no difficulty reaching the conclusion that the First Amendment does not prevent their discharge. Thus, there is no open or important issue to review as evidenced by this Court's denial of certiorari in *Gordon*.

B. The Second Circuit's Ruling Is Consistent With *Branti*

Mr. Diederich repeatedly takes issue with what he describes as the Second Circuit's " 'shared ideology' approach to patronage discharge cases," which "dispens[es] with this Court's teachings that political discharge requires that political affiliation be necessary for effective job performance." (Petition at 8-15) (characterizing the Second Circuit's analysis as "novel").

The opinion below, however, does not mention this "shared ideology" approach. As it has done in several prior cases, the Second Circuit here applied the eight factors identified in *Vezzetti v. Pellegrini*, 22 F.3d 483 (2d Cir. 1994), to determine that the First Amendment did not protect from a government attorney discharge. In both this case and in *Gordon*, the teachings of *Branti* were closely followed. Indeed, *Gordon* explicitly recognized that *Branti* requires a court to focus on whether "party affiliation is an appropriate requirement for effective job performance." 110 F.3d at 887 (quoting *Branti*). *Gordon* also recognized that the *Branti* standard is satisfied "when there is a rational connection between shared ideology and job performance." *Gordon*, 110 F.3d at 889. The analysis applied to this case is consistent with this rule and Mr. Diederich never explains how or why the ruling below is inconsistent with *Branti*. In fact, the Second Circuit's decision here follows *Branti's* dictates that "if an employee's private *political beliefs* would interfere with the discharge of his public duties, his First Amendment rights may be required to yield . . . ," and that a high-ranking government official "may appropriately believe that the official duties of various assistants . . . cannot be performed effectively unless those persons *share his political beliefs* and party commitments." *Branti*, 445 U.S. at 517-518 (emphasis added).

When faced with a *Branti* issue,

> a court's function . . . is to do what courts are often called upon to do — to weigh all relevant factors and make a common sense judgment in light of the fundamental purpose to be served.

Jiminez Fuentes v. Torres Gaztambide, 807 F.2d 236, 242 (1st Cir. 1986), *cert. denied*, 481 U.S. 1014 (1987). This is exactly what the Second Circuit did here. Because the decision below

in no way conflicts with *Branti* or any of the other relevant decisions of this Court, there is no basis for review.

C. The Second Circuit Correctly Analyzed Mr. Diederich's Duties In Applying The *Branti* Standard

Mr. Diederich argues that review should be granted because the Second Circuit only examined the inherent or "paper" duties of his position and that this analysis violated this Court's ruling in *Branti* as well as conflicts with the decisions of other circuits. (Petition at 16). This claim, which also was raised by the *Gordon* plaintiffs, is based on a misreading of *Branti* and a mischaracterization of the lower court's analysis in this case.

Here, the district court examined more than just the written Assistant County Attorney job description because it specifically noted that it considered "the Retainer Agreement signed by [Mr. Diederich] describing [his] duties." (App. 4 n.1). Not only is Mr. Diederich wrong with respect to the factual underpinnings of the decision below, but his legal argument for review is erroneous — there is no intra-circuit conflict. In *Branti*, this Court, "having [ ] framed the issue" around the duties entailed in the particular position at issue, proceeded to analyze the "responsibilities" of the attorney position. *Branti*, 445 U.S. at 1295. The cases relied on by Mr. Diederich (Petition at 16-17) demonstrate that courts interpret *Branti* to require that in the context of the relevant facts of each case, the powers inherent in the position and the duties actually performed be considered. *See Peters v. Delaware River Port Auth. of Penn. and N.J.*, 16 F.3d 1346, 1353 (3d Cir.) (noting that analysis implicates "function[s] of the public office" as well as "actual duties performed"), *cert. denied*, 513 U.S. 811 (1994); *Waskovich*, 2 F.3d at 1297 (examined functions performed as well as inherent functions).

In certain cases — like this one — courts need look no further than the inherent duties of the position to apply the *Branti* standard. *See, e.g.*, *Peters*, 16 F.3d at 1353. Here, Mr. Diederich's self-described actual duties were, if anything, narrower than those inherent in the position. Therefore, the Second Circuit's reliance on his job description was justified. (JA 64-65).

The analysis employed in *Peters,* a case trumpeted by Mr. Diederich as being in conflict with this case, is consistent with the Second Circuit application of the *Branti* standard. In *Peters* the Third Circuit recognized that the functions of the public office in question controls, *not* the actual past duties of the particular employee. *See Peters*, 16 F.3d at 1353. The *Peters* court further explained that

> the actual past duties of the discharged employee are *irrelevant* if the position inherently encompasses more expansive powers and more important functions that would tend to make political affiliation an appropriate requirement for effective performance.

Peters, 16 F.3d at 1353, *quoting O'Connor v. Steeves*, 994 F.2d 905, 911 (1st Cir.), *cert. denied sub nom., Town of Nahant, Mass v. O'Connor*, 510 U.S. 1024 (1993) (emphasis added). The other Third Circuit case cited by Mr. Diederich, *Waskovich*, 2 F.3d at 1297-98, reached the same conclusion and more recent Third Circuit cases confirm this view, *see Wetzel v. Tucker*, 139 F.3d 380, 384 (3d Cir. 1998) (the inquiry "is focused on the function of the public office in question and not the actual past duties of the particular employee involved").

The analysis employed by the Second Circuit in this case also is consistent with the Eleventh Circuit's analysis in *Parrish*

v. Nikolits, 86 F.3d 1088 (11th Cir. 1996), *cert. denied*, 520 U.S. 1228 (1997). *Parrish* stands for nothing more than the unremarkable proposition that "inherent powers and actual job responsibilities . . . should be part of the analysis," *Parrish*, 86 F.3d at 1093, and Mr. Diederich's assertion (Petition at 17) that *Parrish* "pointedly rejected the Second Circuit's narrow approach" is simply not true. When appropriate, the Eleventh Circuit only has looked to an individual's job description to determine whether First Amendment protection from a politically motivated dismissal exists. *See Gordan v. Cochran*, 116 F.3d 1438 (11th Cir. 1997).

D. There Is No Conflict Between The Second Circuit And The Other Circuits As To Whether The Application of The *Branti* Standard Is A Question Of Law Or Fact

Mr. Diederich maintains that this Court should grant his petition to settle an intra-circuit conflict as to whether the *Branti* standard is a question of law or one of fact. An analysis of the cases reveals that this argument, like the others Mr. Diederich advances, is meritless.

In *Branti*, this Court instructed that the ultimate issue in a political termination case is whether, taking into account the specific facts of the particular situation, party affiliation is an appropriate requirement for the effective performance of the position involved. *Branti*, 445 U.S. at 518. The circuit courts, including the court below, consistently have viewed this question as "one in which a mixture of historical facts to be determined by the trier of fact and a test of constitutional law is involved." *Horton v. Taylor*, 767 F.2d 471, 478 (8th Cir. 1985); *see also Mumford v. Basinski*, 105 F.3d 264, 270 (6th Cir.), *cert. denied*, 118 S. Ct. 298 (1997) (finding as matter of law that position was "not protected by the First Amendment"). In other words,

in certain cases both questions of fact and law will exist — the nature of the job at issue may involve issues of fact — but the ultimate constitutional question is one of law. Mr. Diederich fails to see this important distinction.

The Second Circuit's decision below falls in line with the other appellate courts that have addressed this issue and have held that patronage dismissal of similar government attorneys, other than assistant public defenders, did not violate the First Amendment. *See, e.g.*, *Bauer*, 802 F.2d at 1062 (staff legal assistant in Office of Clerk of Circuit Court); *Brown v. Trench*, 787 F.2d 167, 169-70 (3d Cir. 1986), *aff'd*, 829 F.2d 30 (1987) (city solicitor and assistant district attorney); *Livas*, 711 F.2d at 800-01 (public prosecutor); *Ness*, 660 F.2d at 522 (city solicitor and assistant solicitor); *Mummau*, 531 F. Supp. at 404-05 (assistant district attorney).

The district court in *Gordon* submitted two issues to the jury: (1) whether the assistant county attorneys were terminated for political reasons; and (2) whether those terminations were constitutional violations. The Second Circuit held that this second issue, the constitutional question, based on certain undisputed facts, was a question of law. Therefore, it properly found that the district court erred in submitting the question to the jury. *Gordon*, 110 F.3d at 887. The Second Circuit in this case correctly stated that Mr. Diederich's claim "involves precisely the same factual and legal arguments that we recently rejected in *Gordon*." (App. 1a).[3] Accordingly, the court below was entirely justified in concluding that the reasoning of the *Gordon* case applied with equal force to Mr. Diederich's claims.

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3. Significantly, Mr. Diederich does not dispute that the facts of this case and *Gordon* are indistinguishable. Moreover, he affirmatively seeks to rely on testimony elicited in *Gordon* in support of his petition to this Court. (Petition at 4-6).

Mr. Diederich claims that the question of whether a termination violates the First Amendment always must be a question of fact. Merely restating this argument demonstrates its fatal flaw. When dealing with government attorneys, the nature of the position can present questions of law. For example, in *Bauer v. Bosley* the Eighth Circuit found that the nature of the position at issue was clear from the record and that, therefore, it was unnecessary and error for the district court to submit the question to the jury. *Bauer*, 802 F.2d at 1062. Conversely, in *Soderbeck v. Burnett County*, the Seventh Circuit found that the question regarding the nature of a position within a sheriff's office was sufficiently uncertain as to render it a question of fact for the jury. *Soderbeck v. Burnett County*, 752 F.2d 285, 288 (7th Cir.), *cert. denied*, 471 U.S. 1117 (1985). In *Delong v. United States*, 621 F.2d 618, 623 (4th Cir. 1980), the Fourth Circuit employed the same analysis and found that the issue "may be resolved as one of law or fact depending upon the evidence adduced" *and* remanded the case for reconsideration in light of this Court's ruling in *Branti*.

Put simply, Mr. Diederich "confuses the idea of an *issue of fact* with that of a *fact-specific inquiry*." *Gordon*, 110 F.3d at 889 n.3 (emphasis in original). There is no intra-circuit conflict that necessitates review of this question because Mr. Diederich admits that "the material facts are undisputed here." (Petition at 3). Clearly, the Second Circuit was correct in determining that, based on undisputed facts, Mr. Diederich was not entitled to protection from politically based dismissal.

E. The Decision Below Is Not "Sweeping" And Does Not Create An Inappropriate *Per Se* Rule

Mr. Diederich completely mischaracterizes the ruling below by stating that it creates a "categorical rule of exclusion" whereby

all public attorneys are *per se* foreclosed from First Amendment protection. (Petition at 18-19).

The Second Circuit did not create a *per se* rule in its decision. To the contrary, the Second Circuit specifically noted that Mr. Diederich's civil service status was only "one factor to be considered in determining whether a public employee is protected by the First Amendment from a political dismissal." (App. 2a). Citing to *Vezzetti*, 22 F.3d at 486, the court below stated that "no one factor is dispositive," and that the *Vezzitti* factors "should not be mechanically applied, nor should they begin or end the analysis."

Nor did *Gordon* create any *per se* rule. Applying the *Branti* standard, the *Gordon* Court looked to the nature of the Mr. Diederichs' jobs as well as the duties they performed and found that these positions were ones where party affiliation was an appropriate requirement for job performance. *Gordon*, 110 F.3d at 892. The duties performed by Mr. Diederich and the *Gordon* plaintiffs — being privy to confidential information held by elected officials implementing government policy, litigating on the County's behalf and representing the County in legislative committees — can hardly be characterized as "ministerial functions" and other courts similarly have looked to these factors to decide that a position was not entitled to *Branti* protection. *See, e.g.*, *Williams*, 909 F.2d at 154 (city attorney not protected under *Branti* because position entailed defending city against suits concerning policy disputes and negotiating for city in contract disputes); *Jiminez Fuentes*, 807 F.2d at 243-44 (Regional Directors of Urban Housing and Development Corporation not protected under *Branti* because such "confidential" employees participate in policy formation); *Bauer*, 802 F.2d at 1062 (staff legal assistant to circuit court clerk not protected under *Branti* because position entailed representing

circuit clerk in contract negotiations and judicial/administrative proceedings); *Ness*, 660 F.2d at 521-22 (city solicitor and assistant city solicitor not protected under *Branti* because positions entailed providing legal advice to mayor to implement policy).

In an attempt to create an intra-circuit conflict where none exists, Mr. Diederich also incorrectly states that the Eleventh Circuit, in *Cutcliffe v. Cochran*, 117 F.3d 1353 (11th Cir. 1997), *cert. denied sub nom.*, *Cutcliffe v. Jenne*, 118 S. Ct. 1795 (1998) determined that assistant United States attorneys are protected against patronage discharges and that this decision "undoubtedly encompasses assistant county attorneys." (Petition at 19). In fact, the Cutcliffe Court *upheld* the politically-based dismissal of deputy sheriffs. In a footnote, the Eleventh Circuit, however, cited to Justice Powell's dissent in *Branti* and stated in *dicta* that "we believe *Branti* would not permit the dismissal of all Assistant U.S. Attorneys for patronage reasons." *Cutcliffe*, 117 F.3d at 1357-58 n.4.

First, even if this dicta is considered, the Eleventh Circuit has acknowledged that each case must be decided on its own merits, *id.* at 1358, which is consistent with what was done in this case. *Second*, the dissenting opinion in *Cutcliffe* cogently noted that the remark about assistant United States attorneys (not county attorneys such as Mr. Diederich), was inappropriate:

> It puzzles me as to how the majority in this case can take Justice Powell's comments in a dissent in a case involving Assistant Public Defenders, bring them into this case — which involves county Deputy Sheriffs — and volunteer dicta as to what may or may not be done with respect to the employment of Assistant United States Attorneys.

Cutcliffe, 117 F.3d at 1360 n.3 (Kravitch, J. *dissenting*). *Third*, in circumstances analogous to this case, the Eleventh Circuit has recognized that the First Amendment does not protect all governmental attorneys from dismissal. *See Shahar v. Bowers*, 114 F.3d 1097, 1104 (11th Cir. 1997), *cert. denied*, 118 S. Ct. 693 (1998) ("we know of no federal appellate decision in which a subordinate prosecutor, state attorney or like lawyer has prevailed in keeping his job over the chief lawyer's objection.").

The result in this case turned on the application of settled legal standards to facts which Mr. Diederich, could not legitimately dispute. There is no conflict between circuits and disingenuously mischaracterizing this fact-bound conclusion as a "*per se*" ruling does not entitle Mr. Diederich to review in this Court.

F. The Second Circuit's Opinion Does Not Conflict With This Court's "Free Speech" Decisions

Mr. Diederich contends that this Court should review the decision below because the Second Circuit's application of *Branti* allegedly chills free speech and creates a conflict with this Court's decisions in *Pickering v. Board of Education*, 391 U.S. 563 (1968); and *Connick v. Myers*, 461 U.S. 138 (1983).

This is not a case involving a dismissal based on the exercise of the right of free speech. If such a claim had been brought, the lower courts would have applied the balancing test set forth in *Pickering* and *Connick* and determined whether the dismissal was proper. Neither *Pickering* nor *Connick* determined whether governmental attorneys are policymakers and in *Connick* this Court determined that the dismissal of an assistant district attorney did not offend the First Amendment. Moreover, contrary

to Mr. Diederich's assertion (Petition at 19), this case does not conflict with the Ninth Circuit's rulings in *Finkelstein v. Bergna*, 881 F.2d 702 (9th Cir. 1989), *cert. denied*, 502 U.S. 818 (1991) and *Johnston v. Koppes*, 850 F.2d 594 (9th Cir. 1988). Both of these cases involve free speech claims — not questions of *Elrod/ Branti* protection. In addition, the Ninth Circuit has ruled that governmental attorneys similarly situated to Mr. Diederich enjoy no protection under *Branti*. *Fazio*, 125 F.3d at 1332.

The protections guaranteed by this Court's free speech cases are not in any way affected by the application of the *Branti* standard to an entirely different situation — dismissal based on political affiliation. Any implication that a public employee has no free speech protection because of the Second Circuit's *Branti* analysis rulings in this case simply ignores those opinions.

II.

MR. DIEDERICH MISSTATES NEW YORK LAW WHEN HE ASSERTS THAT HE WAS PROTECTED FROM POLITICALLY MOTIVATED DISCHARGE

Mr. Diederich claims that, as an employee classified as "non-competitive" pursuant to section 42 of New York State's Civil Service Law, he is protected from politically-motivated discharge and that principles of federalism therefore mandate that this Court similarly protect him. This claim is demonstrably incorrect. Thus, it is not surprising that in making this argument, Mr. Diederich wholly fails to discuss the applicable New York statute that provides protection from patronage dismissals for only certain employees or any of the cases interpreting this statute.

New York's statutory protection from political discharge is set forth in section 107 of the Civil Service Law which states in relevant part:

> . . . no appointment or selection to or removal from an office or employment *within the scope of this chapter or the rules established thereunder*, shall be in any manner affected or influenced by such [political] opinions or affiliations.

N.Y. Civil Service Law § 107 (McKinney 1983 & Supp. 1998) (emphasis added). In construing the scope of the nearly identically-worded predecessor statute, courts focused on the underscored language, which refers to other statutory sections of New York's Civil Service Law and the rules promulgated thereunder. This is because otherwise,

> the section, literally construed, would apply to positions in the unclassified service and would direct that the appointments of heads of departments should not be influenced or affected by their political opinions or affiliations. Manifestly, such a construction was not intended and has never been adopted.

People v. Prendergast, 148 A.D. 129, 133, 132 N.Y.S. 115, 118 (1st Dep't 1911). Accordingly, the *Prendergast* Court held that public employees classified as "exempt" were not protected by section 107 of New York's Civil Service Law from politically based dismissals.

Courts that have specifically examined whether "non-competitive" employees are similarly excluded from the scope of section 107's protection have, *without exception*, determined that such classified employees are subject to dismissal for political reasons. Indeed, the New York Court of Appeals expressly has held,

> [t]he courts have definitely decided that section 25 [now § 107] does not apply to the exempt class. The same reasoning requires a holding that it does not apply to the noncompetitive class.

Merriweather v. Roberts, 268 N.Y. 12, 20, 196 N.E. 621, 624-25 (1935). *See Deth v. Castimore*, 245 A.D. 156, 157-58, 281 N.Y.S. 114, 117 (4th Dep't 1935) ("section 25 [now § 107] of the Civil Service Law does not apply to one holding an appointment to a position in the noncompetitive class"); *O'Connell v. Gorski*, 715 F. Supp. 1201, 1204-5 (W.D.N.Y. 1989) (dismissal of an assistant county attorney classified as non-competitive upheld in part because Court gave "substantial deference to such classification.")

Not coincidentally, Mr. Diederich fails to cite a single case in which the protection afforded by section 107 was held to apply to a public employee classified as non-competitive. Most of the cases cited by Mr. Diederich do not even involve the dismissal of employees for political reasons. *See Ottinger v. Civil Service Commission*, 240 N.Y. 435, 148 N.E. 627 (1925) (involving the constitutionality of statute permitting the appointment of deputies without civil service examination); *Voorhis v. Warwick Valley Central School District*, 92 A.D.2d 571, 459 N.Y.S.2d 325 (2d Dep't 1983) (holding that "noncompetitive" employee had no protectable property interest in position and was not protected from discharge by Civil Service Law § 75). The other case relied on by Mr. Diederich, *Largo v. Vacco*, 977 F. Supp. 268, 272-3 (S.D.N.Y. 1997), dealt with an employee in the exempt class and in no way addressed whether an employee classified as non-competitive was entitled to protection from discharge based on political affiliation.

In the district court, Mr. Diederich expressly recognized that being classified as non-competitive did not protect him from

a politically motivated discharge. (JA 66, ¶ 27 ("the part-time assistant county attorneys felt that their positions were likely targets for the grant of Republican patronage, since these had the civil service status of 'noncompetitive' (exempt from civil service protection")). Thus, in the courts below, Mr. Diederich admitted that the factual premise underlying his argument to this Court is not true. Given his admission and the "substantial deference" Mr. Diederich contends must be paid to the state's statutory scheme (Petition at 11) the correctness of the Second Circuit's ruling should be obvious.

Mr. Diederich's contention that the Second Circuit's alleged failure to respect New York law regarding the protection of employees from politically motivated discharge "imperils federalism" (Petition at 10) is logically inconsistent and irreconcilable with other of his arguments. On one hand Mr. Diederich claims that the Second Circuit impermissibly adopted a *per se* rule that government lawyers do not have First Amendment protection and argues that the teachings of *Elrod* and *Branti* mandate that each case be decided on its own merits. (Petition at 19). On the other hand, Mr. Diederich specifically asks this Court to adopt a *per se* rule — that if an employee is protected by a state's civil service law, then the employee must enjoy First Amendment protection from dismissal.

Branti itself demonstrates the frivolity of Mr. Diederich's *per se* civil service rule because in *Branti*, as Mr. Diederich admits, the plaintiff assistant public defender was an employee *exempt* from civil service protection under New York law. (Petition at 10). If Mr. Diederich's conception of federalism is accepted — and this Court, therefore, is bound to follow the judgment of New York's legislators — this Court could not have found the *Branti* plaintiffs' First Amendment rights to have been

violated. Accordingly, there is no applicable principle of federalism that requires this Court to review the decision below.[4]

III.

MR. DIEDERICH'S OTHER POINTS PROVIDE NO REASON TO REVIEW THIS CASE

A. Mr. Diederich's Section 1983 Claim Is Meritless

Mr. Diederich seeks review because he believes the lower courts' dismissal of his claim that respondents unconstitutionally took $8,000 of his accrued benefits was incorrect. (Petition at 20). Mr. Diederich fails to explain, however, why he believes the manner in which lower courts allegedly erred merits review by this Court.

As the district court explained, Mr. Diederich failed to show that he had a property interest in his accrued benefits and his unlawful takings claim was merely based upon his assertion that respondents breached his contract. (App. 8a). Without a constitutionally protectable property interest, Mr. Diederich cannot prevail on this claim or obtain review of his petition by this Court.

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4. Circuit courts uniformly hold that *Elrod* and *Branti* require a case by case determination and that no one factor, such as a civil service classification, is determinative. *See, e.g.*, *Vezzetti*, 22 F.3d at 486; *Williams*, 909 F.2d at 153 (the Supreme Court "left it to subsequent courts to determine, on a case-by-case basis, whether political affiliation is an 'appropriate requirement for the effective performance of the public office' "); *Jiminez Fuentes*, 807 F.2d at 242 ("a court's function . . . is to do what courts are often called upon to do — to weigh all relevant factors and make a common sense judgment in light of the fundamental purpose to be served").

The cases Mr. Diederich cites do not help his cause. For example, this Court extended First Amendment protection to dismissals of independent contractors based on political affiliation in *O'Hare Truck Service, Inc. v. City of Northlake*, 518 U.S. 712 (1996). *O'Hare* has nothing to do with an unconstitutional taking of property like that alleged by Mr. Diederich. Moreover, the *O'Hare* Court recognized that the independent contractor could be dismissed if the *Branti* standard was satisfied. *O'Hare*, 116 S. Ct. at 2361. Here, as demonstrated above, *Branti* permits the dismissal of assistant county attorneys based upon political affiliation.

B. Testimony From The *Gordon* Trial Is Irrelevant

Mr. Diederich attempts to take respondents' position at the *Gordon* trial — that the assistant county attorneys were not fired for political reasons — and use it to demonstrate that the Second Circuit erred when it decided that political affiliation was an requirement for the performance of Mr. Diederich's duties. (Petition at 12-15). In support of this illogical argument, Mr. Diederich cites to *Gordon* trial testimony and a hearsay statement (Petition at 5), both of which are taken out of context.

Mr. Diederich's argument demonstrates a fundamental misunderstanding of what the Second Circuit decided in *Gordon* as well as in this case. In *Gordon*, the jury had determined that the plaintiffs were fired due to their political affiliation. This finding was not contested on appeal. *Gordon*, 110 F.3d at 887. The Second Circuit held that such politically based dismissals did not violate the Constitution. Whether the *Gordon* defendants denied that the dismissals were based on political considerations was irrelevant to the Second Circuit's *Gordon* decision, and it is irrelevant here.

The lower courts here — for the purposes of a motion to dismiss — assumed that Mr. Diederich was fired for political reasons. The question next addressed was whether such dismissal was constitutionally permissible. That respondents could contend that Mr. Diederich was actually fired for another reason — because he was incompetent, for example — had no bearing on the only question before the lower courts — assuming the dismissal was politically motivated, did it violate Mr. Diederich's constitutional rights? Mr. Diederich's argument does not make sense, and certainly provides to reason for the Court to review this case.

C. Attorneys' Ethical Obligations Are Irrelevant

Mr. Diederich argues that a lawyer's obligation to maintain integrity, exercise independent professional judgment, represent a client completely and avoid even the appearance of impropriety mandate that attorneys be granted constitutional protection from politically based dismissal. (Petition at 20-22). Again, as with other arguments, Mr. Diederich never explains why being subject to dismissal based on political affiliation imperils these ethical directives and justifies this Court's review of his petition. Clearly, for an attorney such as Mr. Diederich who represented the County before the legislature and department heads and consulted with policy-making boards, it is "difficult to fathom how such responsibilities can be undertaken . . . without political and social philosophy [making] a difference in the implementation of programs" (App. 5a) (quoting *Gordon*). This does not mean, however, that Mr. Diederich is committing ethical violations by fulfilling these duties.

If Mr. Diederich's argument were accepted, then no attorney could be terminated based on political affiliation. Such a result is completely inconsistent with this Court's prior decisions as

well as the nine circuit courts that have upheld government attorney termination claims.

D. The Guarantee Clause of the Constitution Is Irrelevant

Mr. Diederich asserts that his dismissal violates the Constitution's guarantee to the citizens of the United States of a "republican form of government." (Petition at 22). He contends that the Second Circuit violated the Guarantee clause by refusing to respect New York's alleged statutory mandate that civil servants be dismissed only "for cause."

Such a claim cannot be considered by this Court. "A long line of Supreme Court cases have constantly reaffirmed the position that [the Guarantee] clause is nonjusticiable" 1 Ronald Rotunda & John Nowak, *Treatise on Constitutional Law*, § 3.4 at 319 (2d ed. 1992 & Supp. 1999); *see Baker v. Carr*, 369 U.S. 186, 223-24 (1962). The cases that Mr. Diederich relies on are not to the contrary. *See Kohler v. Tugwell*, 292 F. Supp. 978, 982 (E.D. La. 1968) (refusing to hold that action is justiciable, stating that "if the decision[ ] in . . . *Baker v. Carr* require[s] reappraisal, it is not proper to do it here and now."), *aff'd*, 393 U.S. 531 (1969); *Reynolds v. Sims*, 377 U.S. 533 (1964) (action justiciable under the Equal Protection clause, not the Guarantee clause). The cases cited by Mr. Diederich are also distinguishable in that they involve state's actions that allegedly misled voters. *See Kohler*, 292 F. Supp. at 982; *Burger v. Judge*, 364 F. Supp. 504 (D. Mont.), *aff'd*, 414 U.S. 1058 (1973).

Here, Mr. Diederich alleges that the Second Circuit itself violated the Guarantee clause when it decided that Mr. Diederich enjoyed no constitutional protection, which somehow dismantled "New York's merit system of civil service." (Petition at 22-23). If this is not a Guarantee clause issue, then it is repetitious of Mr. Diederich's "federalism is imperiled" argument. (*See*

Petition at 12) ("The Court of Appeal's antimajoritarian disregard for New York's merit system of public employment . . . is contrary to fundamental principles of federalism")).

In any event, as discussed above, New York law did not protect Mr. Diederich from a politically-motivated dismissal. Moreover, by deciding that Mr. Diederich does not enjoy constitutional protection, the Second Circuit upheld the will of the Rockland County electorate who had decided, through their elected officials, that: (a) Mr. Diederich's employment was at the pleasure of the County Attorney and revocable at any time, N.Y. County Law § 502 (McKinney 1991 & Supp. 1998); and (b) for the purposes of financial disclosure, Mr. Diederich was designated as a "policymaker". *See Laws of Rockland County*, Code of Ethics, § 66.11.1, Schedule A(D)(2) (1992).

Finally, Mr. Diederich's Guarantee clause contentions bare no resemblance to the allegations made in his complaint. As the district court noted, Mr. Diederich asserted in this complaint that "it directly harms democracy, and the republican form of government . . . for public employment decisions to be made on the basis of political patronage." (App. 5a, n.3). Because political affiliation was an acceptable basis for Mr. Diederich's discharge, the courts below correctly dismissed this cause of action. Put simply, like all of his other arguments, Mr. Diederich's Guarantee clause claim does not present this Court with: (a) a novel legal issue; (b) a conflict between circuits; (c) an important legal question that has been decided in a way that conflicts with this Court's decisions; or (d) any other reason to grant review in this case.

CONCLUSION

As Rule 10 of the Rules of this Court states "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." That is all, however, that Mr. Diederich offers and it is clear from the facts and the law discussed above that the Second Circuit's ruling was correct. Nor is the decision in conflict with any decision of this Court or with any other circuit. Accordingly, no intercession by this Court is necessary and the petition for certiorari should be denied.

Respectfully submitted,

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No. 98-1487

Supreme Court, U.S.
FILED
APR 26 1999
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

MICHAEL D. DIEDERICH, JR.,

Petitioner,

—v.—

THE COUNTY OF ROCKLAND, C. SCOTT VANDERHOEF, COUNTY EXECUTIVE and PAUL NOWICKI, COUNTY ATTORNEY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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For Petitioner

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This is not a factually unique case, but rather is a case involving fundamental constitutional principles of national importance and application. The Court must uphold the Constitution in this case, so that tens of thousands of attorneys and professionals who choose to enter public service nationwide can (at least when their employment is not "political") enjoy basic First Amendment freedoms, and be encouraged to be professionals, not party hacks.

Moreover, this Court should grant certiorari to give State and local governments the ability to delineate the limited situations where high-ranking public employees are properly "exempt" from civil service and First Amendment protection because of political needs, as distinguished from the *Branti/Elrod* instruction that patronage dismissals are generally impermissible. This is a "bright line": the Court should uphold New York law, including the First Amendment protection it affords to civil servants hired upon merit into a "non-competitive" classified civil service position.[1]

If the Court declines to grant certiorari here, it will essentially deny government attorneys, as a nationwide class, the First Amendment rights enjoyed by other citizens, and encourage cronyism and patronage-based opportunities in direct contravention of a State's choice that civil service be based only upon merit. States and localities will be unable to grant First Amendment protection to their civil servants because, as the Second Circuit has said, this is merely "one factor" in deciding whether to afford First Amendment protection. If the decision below is allow to stand, civil service status will be trumped by the notion that attorneys are always exempt because their jobs are "policymaking," "confidential," or otherwise require "shared ideology." Such disregard for State civil service law turns

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[1] The New York statute by its terms protects "noncompetitive" class employees against politically-motivated adverse job action. Respondents' citation to the 1935 *Merriweather* case, decided 4-3 by the New York Court of Appeals, and *Merriweather's* progeny, is inapposite because *Merriweather* (involving a low-level employee) would be decided differently today in light of this Court's *Branti/Elrod* jurisprudence.

federalism on its head, and reflects antidemocratic federal judicial activism.

In this case, it was an affront to this Court's teachings for the lower courts to hold that attorneys are *per se* exempt from First Amendment protection despite undisputed evidence here that:

- appellant's part-time attorney position was "low level";
- all the more senior (full-time) attorneys were not subject to partisan dismissal, even though Democrats;
- appellant's position was neither confidential nor policy-making;
- Appellant was replaced for political reasons despite respondents' official denial that the discharge of appellant and the Gordon plaintiffs were, or should be, influenced by politics;
- appellant's replacement was offered protection against partisan discharge—a "competitive" title.

Based upon the above, a jury would certainly find that the political justification offered for terminating appellant's employment was a sham, just as the jury found in *Gordon*. The refusal here, and in certain other circuits, to present the factual question of "political discrimination"[2] to a jury denies the litigant and the public of the most appropriate decisionmaker—a jury of citizens with a direct interest in local democracy.

As to appellant's other points, respondents have not shown why this Court should not review the lower courts' serious legal error regarding the Section 1983 First Amendment retribution claim, nor why it should not review the novel Guaranty Clause issue regarding the circuit court's condoning

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[2] Juries make similar factual determinations in race, gender and age discrimination cases each day, throughout the land. First Amendment discrimination should not be treated differently.

municipal deception amounting to "informational gerrymandering."

The facts in this case are undisputed and compellingly favor appellant. Respondents' several "red herring" comments,[3] designed to divert the Court's attention, simply do not contradict the basic facts set forth in appellant's petition.

Conclusion

This case is of great importance to American society, because local democracy and governance are directly impacted by the role played by educated civil servants, including lawyers. A grant of certiorari in this case is imperative, as seen by the compelling issues of law set forth in the petition for certiorari.

Dated: *April 26, 1999*

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[3] Respondents seek to confuse the facts and the legal argument. First, respondents refer to appellant as a confidential employee and policymaker. However, the record does not support such characterization. On the contrary, an adjudication by the New York State Public Employees Relations Board adjudicated appellant's job as neither confidential nor managerial for collective bargaining purposes. JA 145-46. Second, respondents assert, at p. 6, that this certiorari petition is "almost identical" to the petition in *Gordon*, which it most certainly is not. Third, respondents reference a May 3, 1994 retainer agreement which appellant executed after his March 1994 patronage-based discharge as a civil servant (appellant was re-hired as an independent contractor by respondents). JA 56. This agreement is thus irrelevant to the patronage discharge issues in this case. Fourth, respondents assert, at pp. 25-26, that appellant is claiming fully-protected civil service status requiring "for cause" termination, when in fact appellant seeks only protection against politically motivated termination. Finally, respondents imply, at p. 24, that appellant faced a partisan role vis-a-vis the Legislature, his department head, and other instruments of government when, in fact, appellant's department head, the Democratic legislature, and other bodies and boards remained politically intact after the election of a Republican county executive, respondent Vanderhoef.